
Tyler J. Emerson
Litigators and Dealmakers:
A Comprehensive Critique of the California Labor Commission’s Solis Decision and the Talent Agencies Act in the Context of the 2018-2019 WGA-ATA Packaging Dispute

By Tyler Emerson*

I. Introduction

FADE IN:
INT. BEVERLY HILTON HOTEL - DAY
At 3:00 in the afternoon on April 12, 2019, adversaries in pressed power suits glare at each other across a large table. The situation is tense. On one side are representatives for the Writers Guild of America, the largest union for television and film writers in America. On the other side are negotiators for the Association of Talent Agencies, the most important professional organization for talent agents. The franchise agreement binding these two groups expires at midnight. And this room is about to explode.

FLASHBACK TO:
EXT. HOLLYWOOD – ONE YEAR EARLIER.
As spring comes to Hollywood in 2018, the town prepares for an annual tradition known as staffing season. Typically, this time of year is when the symbiotic relationship between writers in the motion picture industry and their agents is most potent. Agents prove their worth as marketers for their clients, finding meetings for them at television networks, and buyers for their work at the studios. Writers try to impress showrunners, producers, and corporate executives. But 2018 is different. Something simmers under the surface and Hollywood buzzes.

Writers malign their representatives, complaining about so-called “packaging” deals. The scribes criticize their agencies for creating “conflicts-of-interest.” The whispers get loud enough that the Writers Guild can no longer ignore them. Conversations are had. A vote is called. And in

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April 2018, the Guild notifies the Association that the writers are terminating the franchise agreement. The termination takes effect in twelve months.\(^1\)

Over the following months, the Association and Guild engage in talks to negotiate a new franchise agreement. However, the Guild does not wait. It drafts a new franchise agreement, which includes a new code of conduct for the talent agents: the Code of Conduct/Franchise Agreement of 2019 (herein “CCFA”).\(^2\) In February 2019, the Guild presents it to the Association.\(^3\) This new franchise agreement takes a hard line on the conflicts-of-interest which prompted the Guild to terminate the prior franchise agreement.\(^4\) The Association is furious, and the Guild anticipates that talent agents will refuse to come to the table. Hoping not to leave its members without competent representation if the talent agents refuse to sign on to the new terms, the Guild issues what shortly would become known as the delegation letter. Therein, the writers’ union advises its membership to use their attorneys to “fill some of the gap” in representation that may occur if the talent agents refuse to sign onto the new CCFA.\(^5\)

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\(^4\) WGA CCFA at § 3(A)(1) (“Agent shall at all times act as a fiduciary of Writer, and shall comply with all fiduciary duties imposed by statute or common law”); see also WGA CCFA at § 3(B).


\(^6\) Robb, *supra* note 3.
action. The parties retreat to their respective headquarters, and by 4:30, the Guild blasts an e-mail to its members reminding them the CCFA takes effect at midnight. The Guild adds one simple mandate: fire your agents if they refuse to sign the new franchise agreement. Over the weekend, 7,000 of the 8,800 active writers in the Guild suddenly become unrepresented.

But even without their traditional middlemen, business goes on. The studios and networks have television shows to staff and feature films need screenwriters for development. They have writing positions to fill. And writers still need those jobs. Thousands of writers wade into murky waters. They look for jobs through hastily-put-together Guild-generated job posting boards, informal mixers where they can meet with showrunners and producers, and Twitter campaigns like #WGASTaffingBoost and #WGAMIX to find the work they had, until then, relied on their agents to find. But once these offers are made, who is to negotiate them on behalf of the writers?

II. Agents, Attorneys and the Packaging Wars

A. Writers, Agents, and The Franchise Agreement

On one side of this dispute are the writers, represented by the Writers Guild of America (herein, the “Guild” or “WGA”). The Guild is actually comprised of two independent but affiliated labor unions, the Writers Guild of America, West (WGAW) and the Writers Guild of America, East (WGAE). These two organizations are so closely aligned that they are often collectively referred to simply as a single union: “the” Writers Guild of America. Formed in the 1950s, the WGA wields substantial influence in the entertainment industry as the collective bargaining representative of almost 30,000 active and inactive members, including showrunners (chief writers

8. Id.
11. WGAE-Writers Guild East AFL-CIO, Labor Organization Annual Report (Form LM-2), at Schedule 13 (U.S. Dep’t of Lab., July 1, 2019) (reporting total membership of 5,116); WGAW-Writers Guild West Independent, Labor Organization Annual Report (Form
and producers on television series), series staff writers, and screenwriters responsible for almost every major motion picture and series. Each of the major studios, their affiliated television networks, and major video-on-demand services are signatories to the WGA’s collective bargaining agreement.12

On the other side of the dispute are the talent agents, represented by the Association of Talent Agents (ATA). The ATA today is a trade association representing talent agents and agencies in the entertainment industries. Formed in 1937 as the Artists’ Managers Guild, the ATA’s members represent almost all of the working talent in Hollywood today, including screenwriters, showrunners, staff writers, actors, directors, and producers. Generally, their job is to introduce talent (workers) to networks, studios, streamers, and financiers (hiring entities) in hopes of soliciting offers from those hiring entities. However, it is standard practice in the industry for talent agents to negotiate material terms for their non-union clients and “over-scale” terms13 for their union clients. The ATA’s membership includes the major talent agencies: Creative Artists Agency (CAA), ICM Partners (ICM), United Talent Agency (UTA), William Morris Endeavor (WME), Agency for the Performing Arts (APA), The Gersh Agency, and Paradigm Talent Agency which collectively represent almost all of writers’ earnings potential in Hollywood.14 The ATA membership also includes over one hundred smaller so-called “boutique” agencies.15

Guilds, writers, and talent agents are formally bound together through a so-called “franchise” agreement. At its heart, a franchise system is a private licensing scheme in which union members “agree to use only agents who have been ‘franchised’ [i.e., licensed] by their respective guilds; in turn, as a condition of franchising, the guilds may require agents to agree to a code of

12. The major studios today are: Columbia Pictures, Paramount Pictures, Universal Pictures, Walt Disney Pictures, and Warner Bros. Pictures. Their corporate sibling networks include the major broadcast networks (ABC, CBS, NBC and FOX), as well as many cable networks (e.g., The CW, USA Network, TBS, TNT, ESPN, MTV, Paramount Network, Comedy Central, etc.). The major video-on-demand services include Netflix, Amazon Studios, and Hulu, among others.

13. “Over-scale” terms mean those contract terms more advantageous to the individual writer than those provided for in a collective bargaining agreement negotiated by such talent’s respective union.


conduct and restrictions on terms included in agent-talent contracts.”16 These arrangements are common across all the major Hollywood guilds,17 and are permitted under federal law.18

In the 1970s, the WGA “desire[d] that a Code of Fair Practice be promulgated . . . to minimize or eliminate any practices [then] mutually deemed undesirable."19 The Guild set out to do just that. While federal law permitted the Guild to set any franchise terms it desired, it also understood the economic reality that the terms could not be so onerous as to discourage agents from representing Guild members. Thus, the WGA entered into negotiations with the Artists’ Managers Guild, which would represent the interests of the talent agents, to craft a franchise agreement acceptable to both sides. Out of these negotiations the WGA drafted and ratified its standard agency franchise agreement: the Artists’ Manager Basic Agreement (“AMBA”).20 Each individual agent or agency would be required to subscribe to its terms before becoming franchised.21 The AMBA would control the scope and mode of agency representation for Guild writers for the next forty-five years, until 2019.

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17. The Director’s Guild of America (DGA) uses the Agreement Between Association of Talent Agents and Directors Guild of America, Inc., and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) uses the Basic Contract Between Screen Actors Guild and Association of Talent Agents and National Association of Talent Representatives.
18. The franchise system is permitted under the National Labor Relations Act, which grants to unions “the right to self-organization . . . for the purpose of collective bargaining or other mutual aid or protection.” See U.S.C. § 157. As a function of self-organizing, unions are generally permitted to create rules for their own members. In 1981, the Supreme Court held the Clayton Act exempts from Sherman Act anti-trust liability a similar franchise system employed by Actors’ Equity Association, specifically holding agents are a “labor group.” H.A. Artists & Assocs. v. Actors’ Equity Ass’n, 451 U.S. 704, 714, 720 (1981). In dicta, the Supreme Court noted “[t]he peculiar structure of the legitimate theater industry, where work is intermittent, where it is customary if not essential for union for union members to secure employment through agents, and where agents’ fees are calculated as a percentage of a member’s wage, makes it impossible for the union to defend even the integrity of the minimum wages it has negotiated without regulation of agency fees” and other agency conduct. Id. WGA rules permit the union to discipline its members for engaging the services of non-franchised agents. See Writers Guild of Am., const., art. X, sec. 1 (empowering guild to discipline members for breaching Working Rules); see Writers Guild of Am., Code of Working R., Working R. 1, Working R. 23 (discipline may include expulsion for breach of working rules, including the rule forbidding the engagement of non-franchised agents).
20. Id.
21. Id. at 1 (“Now, therefore, the following shall be the agreement between [ATA] on the one hand and WGA on the other, and shall also be an agreement with such [Talent Agents] as may subscribe hereto and by such subscription assume the obligations hereof”).
It was the AMBA that ignited the 2019 packaging wars in Hollywood. Pursuant to the terms of the AMBA, the Guild had the right to provide notice to the ATA of its intent to terminate the AMBA, to be effective twelve months later. On April 6, 2018, the WGA exercised its right and notified the ATA. This started the one-year clock. Once the AMBA expired, talent agents would no longer be permitted to represent Guild writers. To remain franchised, they would have to sign whatever new franchise agreement the WGA put in front of them, whatever the terms might be. That one-year clock was set to expire at midnight on April 6, 2019, but by agreement between the WGA and ATA was extended for a week to April 12, 2019, after which the new CCFA franchise agreement would become effective.

B. The Packaging Wars

1. Packaging Historically

To fully understand the tensions between agents and writers requires a robust appreciation of how “packaging” evolved by 2019. Conceptually, it is simply a risk-mitigation strategy. As the old saying goes, a great idea is only worth the paper it’s printed on. Turning a good idea into something marketable takes time, money and resources. So by bundling a great idea with talented personnel able to develop it, produce it, take it to market and sell it (i.e., by packaging it), the chances are higher that the investment of time, money and resources into the idea will be recouped and generate a profit. A higher chance of profitability improves the chance that investors will take a risk on any given project. The film industry is no different. Packaging has existed since the days of silent film. It is the way the business has always operated and, perhaps, will always operate. But the real question then, as it is today, is: whose job is it to put the package together?

In Tinseltown’s earliest years, movie studios bore the burden of packaging their own productions. Studios hired producers whose job was to

22. Id. at 1, § 1(a).
24. Nellie Andreeva, Mike Fleming Jr. & David Robb, WGA & ATA Reach Last-Minute Extension As Franchise Agreement Was Set To Expire, DEADLINE (Apr. 6, 2019, 10:00 PM), https://deadline.com/2019/04/wga-ata-last-minute-extension-franchise-agreement-was-set-to-expire-1202589771/.
put together movies’ creative elements. This included developing stories, hiring writers, directors, actors, and scores of other artists and technicians whose services were required to make films. Studios negotiated with agents on an ad hoc basis. Each script, each writer, each director, each actor was a separate transaction that the studio would have to negotiate through its producer. The agent’s job was merely “to field offers” from the producer and to negotiate for their clients.”26 Typically, this earned the agent a commission, usually in the amount of ten percent of their client’s gross income from such deals.27

But agents were not just gatekeepers for their clients. Agencies became known quantities whom studios could approach for the best or most popular talent. Just as agents swung the doors open one way for their clients, they swung the doors the other way for the studios. Agents became clearinghouses for top-flight talent studios could approach to stock their films with stars who would guarantee box office success. Ultimately, though, it remained the studios’ job to aggregate talent for each of its projects. The agent’s job was simply to represent individual clients in their dealings with the studios. Eventually, though, “the role of the agent added an entrepreneurial component, requiring creative instincts to combine certain literary material” from writers “with appropriate director and/or acting talent in a package presented to financing sources/studios.”28

It is unclear whether the transition to agency packaging was by design on the part of the agents or the studios. But by the 1970s at the latest, studios and networks sought to off-load the burden of packaging their own films and episodic series. In an ever-growing trend, the studios shifted the burden of content development and packaging creative personnel to independent development companies, producers, casting directors and, of course, talent agents.29 For the studios, this meant lower risk. And the studios, motivated by those lower risks, increasingly were willing to provide guaranteed work for known and packaged creative talent. For the agents, this meant more

27. Id. at 216.
28. Id. at 214.
29. See Gary Baum, New Hollywood Economy: Pay-for-Play Auditions for Actors Gain Dominance, Hollywood Reporter (Mar. 30, 2016, 5:00 AM), (“Cost-conscious networks and studios offload a burden once held by productions to cast their own shows onto the labor market itself. Millions of dollars previously spent on casting have been cut from balance sheets. . . . The casting profession has undergone a transformation in the past three decades from a realm defined primarily by staff positions to independent contractor roles”); See Jonathan Handel, Agencies, Writers Guild on Collision Course Over Fees and More, Hollywood Reporter (Apr. 24, 2018, 6:47 AM) https://www.hollywoodreporter.com/news/agencies-writers-guild-collision-course-fees-more-1105208 (“The key issues for the guild: packaging, a half-century old system in which agencies assemble the creative elements of a television series”).
money. Taking ten percent from multiple clients on an individual project was far more lucrative than taking ten percent from only one or two clients on any given film. Less work for the studio. More money for the agent. Guaranteed work for the clients. Simple economics. Efficient capitalism at work. Everybody won. The practice was so common that while the WGA and ATA acknowledged a “difference of opinion,” the AMBA expressly permitted the practice of packaging. 30 But at some point, packaging further evolved.

Today, David Simon is best known as the creator of critically-acclaimed television series like The Wire and Treme. But in the early 1990s, he was still a crime reporter for the Baltimore Sun newspaper and had just published his book, Homicide: A Year On The Killing Streets. An unvarnished look at life in the Baltimore Police Department’s homicide unit and Edgar Award-winner, Hollywood soon came calling. When mega-producer/director Barry Levinson made an offer for the rights, Simon engaged the services of CAA agent Matt Snyder. On his website, Simon describes his experience with the first evolution in agency practices as they began to place more emphasis on closing deals than on the terms of the deals:

Then the contract comes back from Baltimore Pictures [Levinson’s company] . . . . Fine for the option money, a little light on the contingent pilot, pick-up and episodic payments and, of course, farce on the definition of net profits. So I call Matt Snyder back and say so: This seems a little light and it’s a first offer. Let’s go back to Levinson with a counter.

And Matt Snyder of CAA acts as if his client, me, has just thrown a dead, rancid dog on the table. This is my first book sale to Hollywood and Barry Levinson is an A-lister; I should be grateful for this offer and worried that if I nickel-and-dime, Levinson may develop something else. 31

After some cajoling by Simon, agent Snyder returned to Levinson and brought back the terms his client wanted. Simon reports: “Snyder, relentless carnivore that he is, returns to his client with pride and some pocket change.”32 But not every writer is so lucky. Even by today’s standards, Simon’s early 1990s experience is hardly unique. Writers in 2019 reported

30. WGA AMBA, supra note 19, at § 6(c) (“WGA has asserted that the services of Writers in the fields of radio, television and motion pictures are connected with and affected by the packaging representation of Writers and others by [Talent Agents] . . . . The arrangements set forth in this agreement and Exhibit N, so far as they affect packaging representation, constitute a mutual voluntary accommodation by each party of the practical needs which each party considers its members may face with respect to the arrangements under which [Talent Agents] represent writers for services or sale of literary materials or for packaging”).


32. Id.
agents refusing to return phone calls to writers who would not agree to deals.\textsuperscript{33} Some writers even reported agents firing clients who refused to capitulate to a studio’s proposed terms when they were on the table.\textsuperscript{34} A former employee of one of the Big Four agencies reported that “agents would push writers into packages to maximize the agency’s revenue, regardless of whether it was in the clients’ best interests or even what [the writer] wanted.”\textsuperscript{35}

Then, these strained relationships evolved again. In the 1990s and early 2000s, the independent film boom hit. “Indies” gave unknowns an opportunity to break in. They gave veterans “street cred.” And the financial potential for a \textit{Pulp Fiction} or \textit{Blair Witch Project}-level payday gave distributors a gambler’s high. The script became the hottest commodity in town, screenwriters became bona fide movie stars in their own right, and everybody from directors to actors became buyers. Everybody wanted the next Sundance sleeper hit. Up-and-coming distributors like Miramax, New Line and October Films wanted the next Best Picture Oscar winner. The early aughts also saw the rise of “Peak TV,” turning television into gold, and showrunners like Shonda Rhimes and Ryan Murphy into empires unto themselves. The line between seller and buyer was no longer divided by the line between the artist and the studio.

Suddenly, it was no longer unusual for a writer and buyer to be represented by the same talent agent. Nor was it unusual for the agent to represent both the seller and the buyer in the same transaction. Simon more fully illustrates the conflict:

And now, here’s where the real fun starts:

We push forward a decade to 2002 when I have sold my own dramatic television series to HBO. The Wire pilot turned out well enough that the project is set to get a first-season order from HBO and my television agent, Jeff Jacobs of CAA, suggests to me that this thing might really have legs.

“We want to package you,” he offers.

“Package me?”

“Yeah, we’ll take a package on this project and you get your ten-percent commission back. Like with Homicide?

Hanh? “Jake, what the f*** are you talking about.”

“Homicide was packaged and we’ll do the same thing with The Wire.”

“Jake, slow down, what the hell does ‘packaged’ mean?”


\textsuperscript{34} \textit{Id.} at 40.

\textsuperscript{35} \textit{Id.} at 7.
And for the first time, Jacobs explains it to me.

... There was a quiet on the phone. Until I asked a second question: “What other talent did you package with me?”

“Barry Levinson.”

At which point, there was no more quiet.

“Jake, do you mean to say that you represented me, a pissant police reporter from Baltimore in a head-on negotiation with one of Hollywood’s A-list directors and you also represented the director? You represented both sides in the sale of my book and when the low-ball offer came to me, Matt f***ing Snyder acted like it was the only offer I might ever get? Is that what you motherf***ers did?”

... Then I asked another question: “Jake, do you have any written consent from me on file in which I authorize you to rep both sides of the sale of my book? I will answer that for you: You do not. I never authorized this. Not to CAA. Not to my book agent. I never gave informed consent. I couldn’t. Because I was never informed.36

Unfortunately for the young Simon, he had retained the services of an agency that insisted on double-dealing from both sides of the transaction. And this simultaneous representation was given the moniker “packaging.” Even today, such simultaneous representation continues to occur.

2. The Packaging Wars of 2018 - 2019

It does not appear that Hollywood writers take issue with the concept of pure packaging itself. Its traditional implementation is a sound business decision for writers: a means of increasing the prospect of a job offer or a script sale. However, writers have grave concerns about the conflicts that have arisen of late with the final evolutions of so-called “packaging.” These include double-dealing, self-dealing, and the systemic effects of those conflicts. In 2018, screenwriters and television writers identified three major issues that led to their vote to terminate the AMBA in favor of a new franchise agreement with a stronger code of conduct for writers’ representatives.

a. Double Dealing: Packaging Fees

At some point in time, straight packaging reached its zenith. Agencies began offering formal “package” arrangements to studios and networks in which they would pay agencies directly in exchange for packaging services.

In simple terms, agencies began taking fees from the very companies they were supposed to be negotiating against on behalf of their clients. Studios and networks today offer packages to agencies in two different forms. The first is a partial package, in which multiple agencies split a single packaging fee and each is responsible for only certain parts of the total creative bundle. And then there is the full package, more lucrative and coveted by agencies. A full package occurs when an agency is responsible for bundling all of the creative elements on a single production and takes the entire fee. In 2016, 87% of all episodic series were subject to agency packaging arrangements, with CAA and WME alone taking fees from 79% of all packaged series. Today, the major agencies have entire departments devoted to packaging.

Recognizing that representing both buyers and sellers creates conflicts, agencies have attempted to assuage their writer clients by agreeing to waive their rights to their commissions. However, writers took two issues with this. First and foremost, it led to agents who prejudiced their writer clients in order to close deals with their studio and network clients. The relationship between the studios/networks and the agents has become so cozy that agents are even taking moral ownership over the shows. One writer relays a story from one of the Big Four agencies:

As part of their training, the junior agents were given an in-house course on contract negotiation . . . . One of the junior agents was assigned to negotiate a staff writer’s deal on a packaged show. When this junior agent started to present his proposed terms for the deal, one of the senior agents cut in and said: ‘Let me just stop you right there. This is a staff writer on one of our shows. You don’t negotiate these. You take what [the networks] offer, say thank you, and move on.’

Other writers report agents who tout their ability to get their writer clients to take lower fees. One showrunner (a writer in a position to hire other writers on a television show) tells the story of his own agent approaching him to “say, basically, ‘Since we’re packaging this, we can help you out with some of our clients. This writer has a $20,000 quote, but I think I could get them for $14,000.’” One WGA showrunner even reports an agent who “cit[ed] the fact that he had gotten his client . . . to accept a fee substantially below his quote. The agent was bragging about harming their own client.”

The other issue is that packaging fees often vastly outpace the commissions to which agencies would otherwise be entitled. One writer

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38. WGA-Agency Campaign, supra note 33, at 7 (“Before I became a working writer, I worked in the packaging department of a major agency”).
39. Id. at 12.
40. Id. at 15.
41. Id. at 13.
describes his experience on a show that he created, when his agency “negotiated for itself a packaging fee of over $70,000 an episode plus 10% of the backend on the series – the single biggest backend stake,” lamenting that “[his] agency will make more than [him] on this project.” For the writers, the question is: if the studios/networks are willing to pay those kinds of fees to the agency, then why would they not be willing to pay those kinds of fees to the writers and other artists? Further exacerbating this problem is that agency fees are tied to and come directly out of the budgets of film and television shows being packaged. Packaging fees are not merely a transactional cost a studio or network must bear as overhead, but a production expense tied to a particular series or film. Along with costs to pay stunt people and build props, packaging fees are built into the budgets of the shows and movies themselves. As with the budget process in any other industry, more money allocated to the packaging line item means less money allocated to pay for things that make a movie or show better like actors, directors, editors, props, location rentals, visual effects, special effects, or any number of other production-related expenses. As one showrunner lamented, “[p]aradoxically, [the agents’] own argument that they champion independent film collapses on itself because packaging fees take money out of the budget. That money could go to shooting days or special effects.”

b. Self-Dealing: Agency-Owned Productions

The other major conflict in the packaging wars evolved only recently. In 2016, the major talent agencies began to diversify their portfolios by taking direct pecuniary interests in the projects their clients work on, and equity interests in the companies that produce those projects. For example, in December 2016, CAA hired former ABC president Paul Lee to organize and create an agency-owned television studio. In 2017, William Morris Endeavor touted its packaging when it announced, with IMG, the formation of Endeavor Content, which takes ownership interests in the projects it packages. And in 2018, UTA announced it would use $200 million to fund a joint television production venture with Valence Media and Media Rights

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42. Id. at 2.
43. Id. at 10 (“The package fee in the budget is among the highest in the industry”).
44. Id. at 19.
In hiring the writers and other artists, the agencies are not simply representing both sides of the transactions anymore. Instead, the agencies are one side of the transaction and are expected to negotiate against themselves in representation of their writer clients. This constitutes not simply double-dealing, but self-dealing, as the agents become employers of their own clients.

c. Labor Market Constriction and Creative Limitations

Along with conflicts-of-interest arising from packaging and agency-owned productions, writers are also concerned with the indirect consequences of those conflicts. In addition to showrunners’ complaints that packaging fees are a cancer on a show’s budget, the writers and other talent complain about the constraining impact packaging has on the Hollywood labor market. On a microlevel, the market for writers artificially and arbitrarily constricts when agents cause unnecessary delays or outright refuse to close deals for their writer clients. The WGA reports several instances in which agents have refused to work for writers because the agencies have greater interests in packaging:

I like working on a TV writing staff, but agents are not interested in representing writers who want to do that. They’re only interested in writers who develop new projects because that’s how they get a package fee. I went looking for an agent and met with some low level agents at one of the big agencies. They seemed very excited until I said I wanted to work as a staff [writer] on a [pre-existing] show rather than develop [new projects]. They said, ‘If you’re not into developing, then we’re not interested. It’s not worth it to us.’

A network challenged the formula for a package fee that an agency was insisting upon. . . . During a yearlong stalemate the agency withheld series pitches to that network from all their clients. No agency client pitched a series to that network that year. No because the network said they wouldn’t take the pitches; not because the network wasn’t offering enough compensation to the writers. Solely because the agency put its compensation ahead of its clients’ job opportunities, no writers from that agency sold a series to that network. Series that would have sold didn’t.

I was on my way to a meeting with a network executive to pitch a show – a ‘mere formality,’ the exec said, as he was a friend who had told me over dinner a few weeks earlier to ‘just come in and tell it to my people and we’ll

48. WGA-Agency Campaign, supra note 33, at 6.
49. Id. at 9.
have you writing in a week.’ During my drive, I get a call from my agent who says, ‘Turn around. I canceled the meeting. . . . They won’t make a packaging deal with us.50

Agents make their own packaging deals the first order of business with studios and networks. Writers complain that if an agent’s overzealous negotiation of the packaging contract does not scuttle a negotiation entirely, it almost always results in delays negotiating and closing the writers’ contracts.51 While writers wait for these deals to close, they are effectively shut out of other jobs due to potential unavailability. And there are larger systemic issues that arise from modern-day packaging.

The larger problem facing writers is that they have access only to the studios, networks or productions represented by their agencies. Showrunners are forced to hire staff writers represented only by their own agencies. Agents shut out staff writers from every studio with which the agencies do not have packaging agreements in place. Additionally, packaging affects showrunners, staff writers and film writers because packages are limited not just to writers, but every creative element. Agents refuse to help series writers and film writers meet with actors, directors, and producers unless the same agency represents those other creative talents. At least one showrunner reported that a desired actor’s agent refused to even consider an offer on his show. Said the actor’s agent: “Not gonna lie to you, we’re doing everything we can to kill his [i.e., the actor’s] interest in the project . . . No reason we should split packaging fees if we don’t have to.”52 Another showrunner explains that “[p]ackaging limits us creatively. In setting up a show, I have access to 25% of the talent in town” – the talent represented only by his own agency.53 In other words, a staff writer can only get a job on a show if the same agency represents the showrunner. The same is true for actors and directors. This effectively constrains the labor market for artists’ services.

C. What does any of this have to do with attorneys?

At the eleventh hour of the negotiations between the Association and the Guild in 2019, ATA executive director Karen Stuart drew attorneys directly into the growing dispute. Given the WGA’s CCFA franchise agreement, which takes a hard line position on the conflicts-of-interest

50. Id. at 27.
51. Id. at 4 (“This deal took a very long time to close. After it finally did, I talked to the exec at the studio about the delay, and she told me that the packaging fee had held things up. My agency wouldn’t close the deal without the fee’); also id. at 32 (“My manager asked the actor’s agent what was going on. The agent said, ‘Not gonna lie to you, we’re doing everything we can to kill his interest in the project... No reason we should split packaging fees if we don’t have to’").
52. Id. at 32.
53. Id. at 18.
arising from packaging and agency-owned productions, the WGA anticipated the possibility that negotiations with the ATA would break down before expiration of the AMBA. Not wanting its membership to lose all forms of representation at the height of staffing season, the WGA devised a plan in the event the ATA did not sign off on the CCFA. On March 20, 2019, the WGA issued the following so-called “delegation letter”:54

Writers Guild of America, West, Inc., together with Writers Guild of America, East, Inc. (collectively, “Guild” or “WGA”), is the exclusive representative for the purpose of collective bargaining of all writers (“Writers”) employed under the WGA Theatrical and Television Basic Agreement (“MBA”). As such, under the National Labor Relations Act, 29 U.S.C. § 151 et seq., the Guild is vested with the exclusive right to bargain over wages, hours, and terms and conditions of employment on behalf of such Writers. The Guild, in its sole discretion, may delegate its exclusive bargaining authority on terms that it establishes.

The Guild, as the exclusive bargaining representative,55 hereby authorizes you to procure employment and negotiate overscale terms and conditions of employment for individual Writers in connection with MBA-covered employment and MBA-covered options and purchases of literary material, consistent with Article 9 of the MBA. Nothing herein shall be construed to permit you to negotiate terms and conditions of employment inferior to or in conflict with the terms of the MBA.

The WGA followed this with a letter to its members in which it deputized attorneys: “other representatives can support [Guild] members who could soon be without representation . . . . Many Guild members have a manager or attorney who can help fill some of the gap.”56

The ATA ignored the WGA’s letter for nearly a month. Negotiations continued to stall. Finally, on April 12 – the final deadline – the ATA fired back. The ATA’s attorneys issued a public letter “that the WGA’s purported delegation violates both California’s Talent Agencies Act (“TAA”) and New York’s General Business Law,” and demanded the WGA retract the delegated authorization.57 The ATA then issued a stern threat to all

55.  The Guild asserts in this letter that it is the exclusive bargaining representative for all members of the union in all cases. However, other commentators find the WGA’s claim dubious. See Richard Kopenhefer, Deputy Lawyer; WGA Tries Preemption Route in ATA Dispute, SHEPPARD MULLIN LAB. & EMP. LAW BLOG (Apr. 4, 2019), (last visited Apr. 10, 2019) https://www.laboremploymentlawblog.com/2019/04/articles/collective-bargaining/wga-preemption-route-ata-dispute/.
56.  McNary, supra note 54.
entertainment lawyers in California: “The [ATA] considers any and all unlawful procurement entered into at the behest of the WGA to be unfair and unlawful competition that will harm the ATA and its member agencies. . . . ATA will take appropriate action as needed, against any person engaged in unfair competition, to protect the lawful interests of its members.”

Calling the WGA’s position both “shocking and disturbing,” Stuart published a follow-up letter to her membership in which she doubled down on the ATA’s position: “I want to reiterate that we are confident in our position – the law is crystal clear. . . . [T]here are multiple decisions from the California Labor Commission holding that no one other than a licensed talent agent – not a manager, not an attorney – can procure employment on behalf of an artist. It is important to note that ‘procure’ in this situation includes all negotiations on behalf of an artist.” She then magnified the ATA’s earlier threat: “We are evaluating all legal options to address this unlawful conduct. We request that, to the extent you are aware of managers and attorneys who are embracing the WGA’s request to procure and negotiate employment in violation of the law, you track this information and the names of those who are participating in unfair competition, and provide that information to ATA’s attorneys.” The ATA thereby threatened to install an observe-and-report regime unseen since the days of the blacklist.

Given the threats of legal action, lack of guidance from the state bar, and general confusion, many Hollywood attorneys abandoned their writer clients. One anonymous “heavyweight” entertainment attorney said that “[t]he WGA has no right to anoint anyone as a de facto agent to do anything for any of its members that an agent would do. . . . If they want [to] take their members down the garden path, I suggest they re-read relevant New York and California law.” Another anonymous but “prominent” Hollywood attorney reported “[t]he word that is going out all over town to entertainment lawyers is ‘pencils down.’” A third anonymous “influential” attorney said

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58. Putnam Letter, supra note 57.
60. Id.
62. Id.
“[f]orget about it, the whole situation is too toxic,” and dismissed the WGA’s advice as “the misplaced thinking of amateurs who are hurting their members with disinformation.”63 These attorneys seemed hesitant, with fears raised that representing writer clients without an agent could result in complaints to the State Bar, investigations and even disbarment.64 However, a significant number of attorneys rejected the “pencils down” movement advocated by these few attorneys on the grounds that the ATA’s position was grounded on flawed Labor Commission decisions.65

Unwittingly, the ATA made attorneys stakeholders in this dispute by raising the question in an adversarial tone: are licensed attorneys entitled to or prohibited from representing their writer clients in negotiations with studios, networks, and other buyers? As set forth in this article, the Talent Agencies Act does not prohibit attorneys from doing so. Furthermore, public policy, the State Bar Act and the Rules of Professional Conduct for attorneys authorize them to represent Hollywood writers and other artists without a talent agency license or the cooperation of a licensed talent agency.

III. The Talent Agencies Act Does Not Prohibit Attorneys from Negotiating Artists’ Contracts

A. The Talent Agencies Act Generally

The Talent Agencies Act (herein, the “TAA” or the “Act”) is a statutory scheme enacted in 1978 to regulate and license talent agents in California for the protection of writers and other entertainers against unscrupulous talent marketers.66 It compels all persons or businesses that “procure” employment and engagements for artists to obtain a license from the California Labor Commission,67 and sets forth specific licensing requirements.68 The Act also regulates minor formalities in the relationship between talent agents and their clients, such as specific forms that agency contracts must take.69 The TAA grants to the Labor Commission original jurisdiction over disputes between artists and their representatives arising from violations of the Act, and de novo review in the California district courts.70 Together, the TAA and the General Rules and Regulations for Artists’ Managers set forth in the

63. Id.
64. Id.
70. Cal. Lab. Code § 1700.44.
California Code of Regulations71 form the code for licensing and regulating talent agents within the state.

**B. The California Labor Commission applied unlawful principles of statutory construction to render its decision in *Solis v. Blancarte*, the case on which the ATA relies**

Throughout this dispute, the ATA has placed great reliance on a single administrative decision: the California Labor Commission’s 2013 decision in the matter of *Solis v. Blancarte*.72 Mario Solis was a news anchor in Los Angeles. James Blancarte was his attorney, licensed to practice law in California. But Blancarte was not licensed as a talent agent. In 2002, a local news station approached Solis and expressed an interest in hiring him. Solis asked his long-time attorney, Blancarte, to handle negotiation of his employment agreement. Blancarte did. But in 2011, Solis sued Blancarte for alleged violations of the TAA to recover contingent fees paid to the attorney pursuant to their legal services agreement. In proceedings before the Labor Commission, Solis complained that Blancarte violated the TAA by negotiating the contract without first being licensed as a talent agent.73

Blancarte asserted the defense that he was a duly-licensed attorney merely engaged in the practice of law when he negotiated Solis’ contract with the news station. Thus, he argued, his activities should have been exempt from regulation under the Talent Agencies Act.74 The Labor Commission disagreed, stating:

[I]t is of no moment that some of the skills [Blancarte] may have brought to the negotiations on behalf of petitioner are the result of skills for which he has been licensed as an attorney. As Labor Code section 1700.44 makes unequivocally clear, when someone who is not licensed under the TAA wishes to bring such skills to bear on the negotiation of an artist’s contract, he must do so “in conjunction with, and at the request of, a licensed talent agency.”75

Blancarte never appealed the *Solis* decision. Consequently, since 2013, entertainment attorneys in California have worked in legal gray areas while negotiating agreements for Hollywood clients unless such attorneys are

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73. Id. at 1-5.
74. Id. at 8.
75. Id. at 8-9.
dually-licensed as attorneys and as talent agents. But their uncertainty is not supported when one considers the Labor Commission’s faulty reasoning in Solis.

Generally, administrative agencies like the Labor Commission are authorized to interpret the statutes they are charged with enforcing. However, this is not plenary authority. While an agency’s interpretation is given “great weight,” it must be based on principles of statutory construction and “must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers.” The Labor Commission was required to utilize canons of statutory construction in Solis, including a review of legislative history, to interpret the Talent Agencies Act. However, the Labor Commission abrogated its duty by relying on its own equally faulty 2005 decision in Danielewski v. Agon Investment Company. The Danielewski case, however, was wholly inapplicable because the respondent was a talent manager, not an attorney. Additionally, the Labor Commission relied on a mere dictionary definition of “procure” for its holding, despite ambiguity within the definition itself. But closer review of Danielewski reveals a decrepit precedential foundation; Danielewski relied on yet another faulty Labor Commission case: the 1982 matter of Pryor v. Franklin.

So how did the Labor Commission in 1982 determine that the California legislature intended negotiation of an artist’s contract to constitute per se procurement under the Talent Agencies Act? The fact is that the Labor Commission fabricated the statutory construction in whole cloth, with no reliance on legislative or judicial authority:

Respondent even admitted in his Response to the Petition and in his sworn deposition testimony that he had negotiated the employment agreements and engagements for Petitioners during the period 1975 through September 1980. Furthermore, Respondent’s counsel conceded at the hearing that Respondent had been Petitioners’ “sole and exclusive negotiator.”

76. Id. at 6-7.
77. Buchwald v. Super. Ct., 254 Cal.App.2d 347, 355 (1967); see also PacifiCare Life & Health Ins. Co. v. Jones, 27 Cal.App.5th 391, 401 (2018) (“an agency’s authority to enforce or administer a statute includes the power to adopt a regulation ‘to implement, interpret, or make specific the law enforced or administered by it’”).
81. Id. at 15-16.
The evidence of Respondent’s active and continuous participation in the process of negotiating the terms of Pryor’s employment over the five year period would, standing alone, constitute sufficient evidence of unlawful procurement and attempted procurement to warrant and justify a finding that Respondent had engaged in the occupation of an artist’s manager and talent agent without a license and in so doing had flagrantly violated the Act.

We reject Respondent’s contention that to prove unlawful procurement or attempted procurement one must offer evidence of solicitation or an initiated contact. This argument runs afoul of well established principles which we choose to follow, namely, that the furthering of an offer constitutes a significant aspect of procurement prohibited by law since procurement includes the entire process of reaching an agreement on negotiated terms where the intended purpose is to market an artist’s talent. These principles are totally in accordance with the purposes of the Act.82

Notice the lack of internal citations.

So, the question naturally arises: from what authority do these “well established principles” arise that the Labor Commission supposedly followed? The answer: none. The Labor Commission cited to no authority articulating these “well established principles.” The Labor Commission engaged in zero study or analysis of committee reports or legislative statements. The Labor Commission engaged in zero analysis of the legislative history of the statute. And yet these unidentified principles became the basis for the 1982 Pryor decision, which in turn became the basis for the 2005 Danielewski decision, which in turn became the basis for the 2013 Solis decision on which the ATA relied. If Pryor is the poisonous tree, then Solis is its fruit.

The California Labor Commission relied on precedent that arbitrarily and ambiguously cited authorities it could not identify. Furthermore, the Labor Commission failed to apply canons of statutory construction. And in clear violation of California state law, the Labor Commission failed to render “a reasonable and common sense construction in accordance with” the legislative intent behind the Talent Agencies Act.83 Courts should disregard and give no deference to Solis.84

C. The plain language of the Talent Agencies Act neither prohibits nor authorizes licensed attorneys to engage in activities constituting the “practice of law” in California

84. W. States Petrol.,57 Cal.4th at 437 (“courts give the agency’s interpretation of statutory language “great weight” but do not otherwise defer”) (Kennard, J., concurring).
The heart of the TAA lies in Section 1700.4 of the Labor Code. This section defines a “talent agent” as “a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists.” It does not expressly include or exclude from the definition any professionals otherwise licensed in the state such as attorneys, sports agents, insurance agents, real estate agents, stock brokers, etc. Whether a person is a talent agent is not dependent on his or her title, but whether their activities fall under the “procurement” rubric set forth in the statute itself. However, the statute is painfully silent on whether attorneys are talent agents. The Talent Agencies Act also fails to define in its plain language just what constitutes “procuring, offering, promising, or attempting to procure” employment or engagements. Simply, the black-letter of the statute is silent as to whether attorneys’ activities negotiating employment and engagement contracts for their clients in the entertainment industries constitutes “procurement” that is subject to the Talent Agencies Act.

Fortunately, the legislature provides a roadmap for how to interpret this silence. That roadmap is a similar statute which regulates agents in a similar industry: California’s Miller-Ayala Athlete Agents Act. Prior to enactment of the Miller-Ayala Act, the athlete agent law in California’s Business and Professions Code did not address whether attorneys engaged in contract negotiations on behalf of athletes were subject to the licensing and regulatory requirements of the athlete agent law. “Rather, agent-attorneys were regulated [solely] by rules of ethics set forth by the California State Bar Association.” But in 1996, the state legislature decided to end its silence on the matter. The Miller-Ayala Act expressly and unambiguously amended the Business and Professions Code to subject attorneys to the licensing and regulatory requirements of the athlete agent laws. This change required attorneys to become dually licensed to negotiate on behalf of their athlete clients.

Using remarkably similar language to the Talent Agencies Act, the Miller-Ayala Act defines an “athlete agent” not by a person’s title but by the activities in which he or she is engaged. Section 18895.2(b)(1) of the Business and Professions Code defines an athlete agent as “any person who, directly or indirectly, ... procures, offers, promises, attempts or negotiates to obtain employment for any person with a professional sports team.” 89 This language tracks with Section 1700.4(a) of the Labor Code which defines a talent agent as “a person . . . who engages in the occupation of procuring, promising, or attempting to procure employment or engagement for an artist.” 90 Further distinguishing the black letter law of the Talent Agencies Act from the Miller-Ayala Act is the express inclusion of attorneys engaged in negotiation of employment agreements on behalf of their athlete clients in the definition of “athlete agents” under Miller-Ayala. Section 18875.2(b)(2)(A) of the Miller-Ayala Act expressly defines the term “athlete agent” to include any “person licensed as an attorney . . . to the extent that the [attorney] also . . . for compensation procures, offers, promises, attempts, or negotiates to obtain employment for any person with a professional sports team.” 91 The Miller-Ayala Act is express and unequivocal: licensed attorneys must be secondarily-licensed as athlete agents to negotiate or procure employment for athletes in California. Conversely, the plain, facial language of the Talent Agencies Act remains silent on the issue.

Contrast the loud legislative expression and lack of ambiguity in the Miller-Ayala Act with the deafening legislative silence in the Talent Agencies Act. The Miller-Ayala Act presents a clear means of interpreting this legislative silence. Prior to, and but for, the California legislature’s clear intent to speak through the Miller-Ayala Act, California permitted attorneys to do anything and everything that athlete agents were permitted to do. The Miller-Ayala Act clearly and expressly ended that silence. And just as the legislative silence prior to the Miller-Ayala Act was held to empower attorneys, so must the same silence in the Talent Agencies Act today be interpreted. A statute may expressly and unambiguously prohibit attorneys from engaging in conduct that otherwise would constitute the practice of law. But if it does not, then such silence must be interpreted to permit them to do so even though such activities also constitute unlicensed procurement.

A second black-letter distinction exists. The plain language of the Miller-Ayala Act clearly treats “procurement” activities as separate and distinct from “negotiation” activities. As Section 18895.2(b)(2)(A) states, an athlete-agent is one who “procures . . . or negotiates” employment or engagements on behalf of professional athletes. The key language in the statute is “or negotiates.” This language clearly implies an athlete-agent may

engage in procurement or negotiation without necessarily engaging in the other. Therefore, negotiation is not *per se* procurement. Compare this to the Talent Agencies Act, which merely brings under its regulation only procurement activities. Whereas the California legislature clearly decided in an analogous regulatory scheme that procurement and negotiation are not the same thing, the Labor Commission apparently thought itself the better arbiter of the matter in *Solis* when it decided that negotiation necessarily constitutes *per se* procurement. The plain language of the Talent Agencies Act lacks two important elements found in the Miller-Ayala Act: an express inclusion of attorneys in the definition of “talent agencies,” and a solid line distinguishing procurement from negotiation. Therefore, what can be surmised from the plain language of the TAA is (i) that the state legislature never intended attorneys to be included in the definition of talent agents when the practice of law also constitutes procurement; and (ii) the negotiation of contracts does not constitute procurement of employment, and so an attorney’s negotiation of a writer’s contract does not constitute procurement; and for that reason cannot violate the Talent Agencies Act.

In coming to this better-reasoned conclusion, it is as important to consider both the plain language of the statutes and the legislative processes during the 1996-1997 session of the state legislature that led to passage of the Miller-Ayala Athlete Agents Act. Not only does the Miller-Ayala Act expressly include attorneys, but it also expressly excludes talent agents “as defined in subdivision (a) of Section 1700.4” of the Talent Agencies Act. In other words, the state legislature was unambiguously considering the role and relationship of not two types of representatives, but three types of representatives: attorneys, sports agents, and talent agents. In addition to enacting the Miller-Ayala Act, the legislature in the same session also expressly amended the State Bar Act specifically to conform to the Miller-Ayala Act. As codified today, the State Bar Act states explicitly that “[i]t shall constitute cause for the imposition of discipline of an attorney . . . for an attorney to violate any provision of the Miller-Ayala Athlete Agents Act.” Nothing in the legislative record suggests that the state legislature attempted to amend the State Bar Act in 1996 to reflect an intent that attorneys would be subject to the Talent Agencies Act. And nothing in the

D. The legislative history of the Talent Agencies Act does not demonstrate a legislative intent to prohibit licensed attorneys from negotiating employment or engagement agreements on behalf of their entertainment clients

As the worldwide leader in entertainment, California has long had an interest in regulating the industry to protect workers’ welfare, including regulation of artists’ representatives.96 The state’s legislative history regulating talent agents and artist managers extends back more than a century. And as important as what is in that history is what is wholly absent from it. Through every statutory scheme enacted since 1913 relating to talent representation, the exclusive focus of the California legislature has always been on (i) the licensing and regulation of employment agents in the entertainment industries, and (ii) the relationship between the job functions of agents and managers. But never in the journals of the legislature is there an indication that the state legislature considered – let alone intended – that attorneys would be or should be subject to licensing and regulation thereunder.

1. Private Employment Agencies Law of 1913

In the earliest part of the twentieth century, California had not yet codified statutes by general subject matters as it does today, for example, through the modern-day Labor Code and the Business and Professions

Instead, state statutes could be codified into one of four general legal codes: the Penal Code, the Civil Code, the Code of Civil Procedure, and the Political Code. However, a significant number of legislative enactments did not fit into any of the above. Such orphan legislation was simply left uncodified in the California Statutes.

In 1903, California passed an act “defining the duties and liabilities of employment agents” generally that merely limited commissions to ten percent. To the extent that talent agents were merely employment agents who specialized in finding clients jobs in entertainment, this was the first piece of California legislation arguably implicating the conduct of talent agents. But it was another ten years before California enacted legislation specifically regulating employment agencies in the entertainment industries. In 1913, California passed the Private Employment Agencies Law. Uncodified and left in the general California Statutes, this new law highly regulated all forms of “employment agency,” including licensure requirements and delegation to the state Labor Commission.

The PEAL merely applied ancient agency law. Importantly, though, it specifically defined and brought within its ambit all “theatrical employment agent[ies].” And for the first time, entertainment agencies were specifically subject to substantive regulation. The PEAL required all theatrical agents, as part of the licensing process, to include a statement amounting to a background check prior to licensure, and to submit to the labor Commission all forms of contracts to be used. However, the broader licensing requirements and regulations of the PEAL applied not just to theatrical employment agents, but also to all “intelligence office[s], domestic and commercial employment agent[ies], . . . teachers’ employment agent[ies], general employment bureau[s], shipping agent[ies], nurses’ registr[ies], [and] any other agent[ies] or office[s] for the purpose of procuring or attempting to procure help or employment or engagements.”

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97. These subject-matter codes would not be established until 1937. See infra, at 34-35; see also 1937 Cal. Stats. 230, Ch. 90. (Cal. 1937) (establishing Cal. Lab. Code); 1937 Cal. Stats. 1230, Ch. 399 (Cal. 1937) (establishing Cal. Bus. & Prof. Code).


99. Ex parte Dickey, 144 Cal. 234, 234-35 (1904) (declaring a 1903 statute unconstitutional which placed limitations on commissions).

100. 1913 Cal. Stats. 515, Ch. 282 (Cal. 1913) [hereinafter PEAL].

101. Id. at 515 (§§ 1.3, 1.4).

102. Id. at 520-521 (§§ 15, 16).

103. Id. at 515 (§ 1.2).
PEAL, however, was any mention of attorneys. The state regulated attorney conduct long prior to the PEAL enactments, going back to the nineteenth century.\textsuperscript{104} But there is no indication in the PEAL provisions themselves as passed, or the draft bill language of the PEAL enactments that the California state legislature in 1913 intended or even considered the new law’s application to attorneys.\textsuperscript{105}

2. The California Labor Code of 1937

In the ensuing years, three occurrences happened pertinent to the legislative history of the Talent Agencies Act as it relates to attorneys. First, in 1927, California enacted the State Bar Act for the licensure and regulation of attorneys;\textsuperscript{106} a statute that preempts the field of attorney regulation when the practice of law is implicated.\textsuperscript{107} Second, in 1929, the legislature established the California Code Commission as a permanent government agency to sweepingly and permanently codify the California Statutes, then described as existing “in a deplorable condition” and “the worst statutory law in the country.”\textsuperscript{108} Third, in 1937, California enacted the first state Labor Code.\textsuperscript{109} Through this enactment, the state legislature adopted as Part 6 of the new Labor Code the previously-uncodified PEAL, including all provisions specific to the licensure and regulation of theatrical agents.\textsuperscript{110}

Simultaneously with enactment of the new Labor Code, California modified the PEAL provisions of the new Labor Code (i.e., Part 6) to reflect California’s then-infant motion picture industry. Specifically, the legislature included in Part 6 of the new Labor Code yet another classification of general employment agent: “motion picture employment agencies.”\textsuperscript{111} The new California Labor Code now included in the definition of general

\textsuperscript{104} See Ex parte Yale, 24 Cal. 241, 242 (1864) (“an attorney of this Court, having been admitted as an attorney and counsellor of this Court since its organization under the Constitution of the State . . . and otherwise conformed to the rules of this Court as an attorney”).

\textsuperscript{105} Cal. S.B. 1413, 1912-1913 Leg., 40th Sess. (Cal. 1913) (intro’d Cal. Senate J., 40th Sess. at 496 (Feb. 3, 1913), amended id. at 669 (Mar. 22, 1913), amended id. at 1077 (Apr. 5, 1913), enrolled id. at 3038 (May 12, 1913)).

\textsuperscript{106} In re Attorney Discipline System, 19 Cal.4th 582, 590 (1998).

\textsuperscript{107} Baron v. City of Los Angeles, 2 Cal.3d 535, 543 (1970) (“the State Bar Act preempts the field of regulation of attorneys only insofar as they are ‘practicing law’ under the act—i.e., performing services in a representative capacity in a manner which would constitute the unauthorized practice of law if performed by a layman”).


\textsuperscript{109} 1937 Cal. Stats. 185, Ch. 90 (“An act to establish a Labor Code, thereby consolidating and revising the law relating to labor and employment relations”) [hereinafter AML].

\textsuperscript{110} Id. at 230, Part 6 (codifying Cal. Lab. Code §§ 1550 et seq.).

\textsuperscript{111} Id. (Cal. Lab. Code § 1552(b)).
“employment agencies” two categories pertinent to the entertainment industries: theatrical employment agencies and motion picture employment agencies. But the practical effect was no effect at all. Theatrical employment agencies would continue to be regulated in accordance with the PEAL, though now codified in the new Labor Code. And motion picture employment agencies would also now be licensed and regulated pursuant to those same provisions of the same Labor Code. Importantly, however, nothing in Part 6 of the new Labor Code included attorneys as “employment agencies.” In fact, the State Bar Act never existed under the Labor Code at all, but instead was codified in 1939 under the Business and Professions Code where it remains to this day – wholly separate from talent agency regulation. And neither did the legislature amend the then-new Labor Code nor the State Bar Act to authorize or prohibit licensed attorneys from procuring or negotiating employment or engagement contracts on behalf of artists.

3. 1943 Artists’ Managers Law

By World War II, the entertainment business was changing rapidly. In addition to attorneys and employment agents, entertainers increasingly were reliant on a third member of their professional team: the personal manager. And so, in 1943, the state legislature passed the Artists’ Managers Law (“AML”), amending the Labor Code to add a separate statutory scheme licensing and regulating “artists’ managers.” This new statutory scheme existed in the same chapter, yet still separate from the PEAL provisions of the Labor Code which continued to regulate talent agents.

Defined as “a person who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers,” managers were separately licensed and regulated. California law did not treat agents and managers as interchangeable. Noting the difference in job duties, i.e., that agents procured employment for artists while managers advised and counseled them, the AML amendment to the Labor Code required a separate license for each job, and permitted people to “apply for both an employment agency license and an artists’ manager license.” In other words, holding one license did not confer privileges on the licensee to engage in the other occupation.

112. Id. (Cal. Lab. Code §§ 1551(a), 1552(a)).
114. 1943 Cal. Stats. 1326, Ch. 329 (Cal. 1943) (codifying Cal. Lab. Code §§ 1650 et seq.) (hereinafter AML Amts.).
115. Id. at 1326, § 1.
One important aspect of the AML amendments to the Labor Code is the residual language that appears in the modern day Talent Agencies Act. At that time, the state legislature included a safe harbor for talent managers who might otherwise run afoul of the PEAL’s employment agencies regulations. Referred to as the “incidental procurement” provision of the AML provisions of the Labor Code, this section permitted artists’ managers to procure employment and engagements on behalf of artists, but “only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services” of an artists’ manager.\(^{117}\) It is in this incidental procurement provision of the 1943 AML amendments to the Labor Code that the language first appears on which the Labor Commission relied in the *Solis* decision, *supra*.

In 1943, the state legislature expressly mandated that a person be subject to dual-licensure in order to procure employment as an agent and separately to counsel artists as a manager. However, the AML amendments to the Labor Code remained conspicuously silent on the application of the Labor Code to attorneys. None of the prior drafts of the AML amendments suggest the legislature contemplated or intended the Labor Code to require the dual or even *triple*-licensure for persons wishing to counsel clients as managers, procure employment as agents and negotiate employment contracts as attorneys. Nor did it amend the State Bar Act at that time to prohibit licensed attorneys from either counseling, negotiating for, or otherwise generally representing their Hollywood clientele. The AML drafts, the final form of the Labor Code, and the State Bar Act remained wholly silent on the matter.

4. Artist Managers Act of 1959

In 1959, the legislature again amended the Labor Code, this time by enacting the Artist Managers Act (AMA). On its face, the AMA merely rearranged the Labor Code as it related to regulation of managers. In 1943, Chapter 1 of Part 6 of the Labor Code was still, in essence, merely the PEAL. Chapter 1 regulated all private employment agencies, including all theatrical employment agencies and motion picture employment agencies. And the 1943 AML amendments merely added the artists’ manager provisions to Chapter 1 as sub-chapters relating to all employment agencies. But the 1959

AMA did something that no prior artist representative legislation had done. It removed all of the artists’ manager provisions from Chapter 1 of the Labor Code, and recodified them to Chapter 4.\footnote{1959 Cal. Stats. 2920, Ch. 888, § 1 (Cal. 1959) (“Chapter 4 (commencing at Section 1700) is added to Part 6, Division 2 of the Labor Code”)[hereinafter AMA].}

At first glance, this appears to be merely legislative housekeeping. However, by re-codifying talent manager regulations separately from employment agency regulations, i.e., from theatrical agent and motion picture agent regulations, the state legislature signaled its “increased realization that ‘the business of procuring employment in the entertainment industry . . . is different and in many ways more complex than the business of the normal employment agencies the Labor Commission regulates.’”\footnote{O’Brien, supra note 96, at 494 (quoting Philip R. Green & Beverly R. Green, Talent Agents and the New California Act, 1988 ENT’M’T., PUBLISHING AND THE ARTS HANDBOOK 357, John D. Viera & Robert Thorne eds. (1988)).} The 1959 AMA retained the incidental procurement language in Section 1700.4 of the Labor Code, and thus the AMA provisions of the Labor Code became the truest progenitor of the Talent Agencies Act as it exists today.

Nothing in Chapter 1 or Chapter 4 of the Labor Code expressly or impliedly suggested an intent to regulate attorneys under any section of those chapters of the Labor Code. The legislature did not amend the State Bar Act to prohibit attorneys from negotiating artists’ contracts. Nor did the legislature amend the State Bar Act to subject attorneys to licensure or regulation under the Labor Code instead of the State Bar Act.

5. Employment Agency Act of 1967

In 1967, the state legislature wholly separated talent agents and artists’ managers statutorily. With passage of the Employment Agency Act of 1967, the California legislature finally created total statutory distinction between laws regulating talent agents and laws regulating artists’ managers. The act repealed the Labor Code’s PEAL provisions and re-codified them in the Business and Professions Code.\footnote{1967 Cal. Stats. 3557, Ch. 1505, §§ 1, 2 (1967)[hereinafter AMA Amts.].} Meanwhile, artists’ managers would continue to be regulated by the Labor Code.\footnote{AMA Amts. at 3557, § 1 (codified in Cal. Bus. & Prof. Code § 9914 [later repealed]) (“Nothing in this chapter shall apply to an artists’ manager, as defined or licensed under Chapter 4 (commencing with Section 1700) of Part 6 of Division 2 of the Labor Code”).} Additionally, and for the first time, the PEAL permanently removed from its definition of “employment agency” the sub-classifications of theatrical employment agencies and motion picture employment agencies.

Instead, talent agencies presumably were intended to be regulated by the Business and Professions Code by virtue of meeting the broader definition of an “employment agency” under the 1967 act, as “any . . .
business . . . which procures, offers, promises or attempts to procure employment or engagements for others.”\textsuperscript{122} Furthermore, no prior talent agency (i.e., theatrical employment agencies or motion picture employment agencies) received special treatment as they had before. Talent agents, theatrical employment agents, and motion picture employment agents were simply “employment agents” under the Business and Professions Code,\textsuperscript{123} while artists’ managers were simply “artists’ managers” under the Labor Code. However, nowhere in the 1967 Employment Agency Law did the state legislature amend either the Business and Professions Code or the Labor Code to bring licensed attorneys under their regulatory authority. Nor did the legislature amend the State Bar Act.

6. Talent Agencies Act of 1978

Finally, in 1978, the state legislature enacted what would become the modern-day Talent Agencies Act. The most significant change was that, for the first time, talent agents were no longer subject to the general agency licensing requirements and regulations of the PEAL’s successor statutes. Instead, regulation of talent agents returned to the Labor Code. Once again, and permanently, talent agents would be treated differently and specially from general employment agents. The means by which this was achieved was the de-regulation of artists’ managers combined with stricter regulation of talent agents, all by changing two simple words. The Talent Agencies Act amended Section 1700.4 of the Labor Code to define a talent agency as “a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists.”\textsuperscript{124} Effectively, the amendment merely changed the term “artists’ manager” as used in Chapter 4 of the Labor Code to “talent agent.” With this simple stroke of a pen, the job of a talent manager in California became unlicensed and unregulated.

However, the 1978 TAA also changed the relationship between agents and managers. First, it permitted talent agents to “counsel or direct artists in the development of their professional careers.”\textsuperscript{125} This immediately de-regulated what formerly was a licensed profession, i.e., the counseling and directing of artists, and made it more competitive as managers now had to compete with talent agents who were permitted to engage in the same

\textsuperscript{122} Id. (codified at Cal. Bus. & Prof. Code § 9902(a) [later repealed]).

\textsuperscript{123} It is worth noting that the PEAL is still in force today, having been re-codified from the Business and Professions Code to the Civil Code by the Employment Agency, Employment Counseling, and Job Listing Services Act of 1989. 1989 Cal. Stats. 2304, Ch. 704, §§ 1, 2 (Cal. 1989).

\textsuperscript{124} 1978 Cal. Stats. 4575, Ch. 1381, § 6 (Cal. 1978) (amending Cal. Lab. Code § 1700.4) [hereinafter TAA].

\textsuperscript{125} Id. (amending Cal. Lab. Code § 1700.4).
conduct. The 1978 TAA also repealed the incidental procurement provision that previously had been a safe harbor for talent managers. While managers were no longer required to obtain a license “to counsel or direct artists in the development of their professional careers,” they also were no longer permitted to engage in procurement activities unless they were licensed under the Talent Agencies Act provisions of the Labor Code.

But most importantly, and once again, the state legislature found itself concerned exclusively with regulation of talent agents and managers. In the greatest seismic shift in the licensing and regulation of artists’ representatives in state history, absolutely nothing in the legislative history from the 1977-1978 session suggests the legislature considered - let alone intended - that the TAA would regulate attorneys under the Labor Code instead of the State Bar Act. No committee report and no draft bill ever implies such consideration or intent. Furthermore, what is indisputable is that while amending the Labor Code through the Talent Agencies Act, the California legislature wholly failed to amend the State Bar Act provisions of the Business and Professions Code to reflect such changes.

7. 1985 California Entertainment Commission Report

In 1982, the state legislature formed the California Entertainment Commission to “study the laws and practices of [California], the State of New York, and other entertainment capitals of the United States relating to the licensing of agents and representatives of artists in the entertainment industry.” The commission’s ultimate objective was to “recommend to the Legislature a model bill regarding this licensing” and regulatory scheme. In 1985, the Entertainment Commission published its findings. And while the Entertainment Commission’s purview included representation across all the entertainment industries, ultimately the state legislature enacted amendments to the Talent Agencies Act in 1986 specific only to the music and recording industry. These were the last major amendments to the Talent Agencies Act.

127. TAA at § 7 (Cal. Lab. Code § 1700.5).
128. Id.
130. Id. (Cal. Lab. Code § 1701).
132. 1986 Cal. Stats. 1804, Ch. 488, § 2 (amending Cal. Lab. Code to re-create incidental procurement provision in Section 1700.4 for people engaged in “procuring . . . recording contracts for an artist”) [hereinafter 1986 TAA Amts.].
It is important to note for purposes of examining the legislative history of the TAA that while the legislature’s ultimate amendments were quite limited in scope, they were broadly considering the TAA’s application across all sectors of the entertainment industry. As important is a critique of the statutory make-up of the Entertainment Commission itself. The commission was statutorily comprised of three licensed talent agents, three personal managers, and three artists to the commission. The California Labor Commission would sit as the tenth member of the commission.\(^{133}\) Conspicuously absent, however, was a representative of the entertainment bar who could speak for the third branch of artist representation: entertainment lawyers. Attorneys had no voice on the commission.

But furthermore, the commission itself voiced no opinion on application of the TAA (or its corollary in other states) to duly-licensed attorneys. Fascinatingly, the 39-page report focuses exclusively on the relationships between artists and their agents and managers. The word “agent” or “agency” is mentioned 34 times (not including its use in quoted statutory language). The word “manager” is mentioned 30 times. But the number of times the commission mentioned “attorneys” or “lawyers?” Zero. The closest the commission ever came to implying that attorneys ought to be regulated under the Labor Code instead of the State Bar Act was through the use of collective, ambiguous phrases such as “or anyone” or “anyone other than a licensed Talent Agent.”\(^{134}\) The commission attached a five-page summary at the end of its report titled \textit{Summary of Legislation Preceding the Talent Agencies Act}.\(^{135}\) Therein, the commission focused exclusively on the state’s licensing and regulation of artist agents arising out of artists’ concerns regarding artist managers. However, at no point therein did the commission suggest that artists’ concerns regarding attorneys were also the subject of the commission’s research. The clear purpose of the Act was always to protect artists from unscrupulous talent agents and unscrupulous artist managers – not to create a legal monopoly for talent agents. Other commentators have noted the deficiency of the Entertainment Commission’s processes and findings.\(^{136}\) While the last amendments pertained only to the recording industry, the important consideration is that yet again the California legislature ignored the attorneys.

\(^{133}\) 1982 TAA Amts. at 2816, Ch. 682, § 6 (Cal. Lab. Code § 1701).
\(^{134}\) Cal. Entm’t. Comm’n., supra note 131, at 7, 11.
\(^{135}\) \textit{Id.} at 35-39.
\(^{136}\) See, e.g., Bradley W. Hertz, \textit{The Regulation of Artist Representation in the Entertainment Industry}, 8 \textit{LOY. L.A. ENT. L. REV.} 55, 68 (1988) (“It seems that the California Entertainment Commission abdicated its responsibility on the very issue that it was charged to resolve. The problem will not go away simply because the Commission has reaffirmed the current law”).
8. Summary

Simply put, the state assembly never in the eleven decades since enactment of the PEAL considered or intended any of its artist representation legislation to claw attorneys into the fold. The state assembly has authority to statutorily require attorneys to be dually-licensed to engage in certain defined agencies. This much is clear from the fact that the state legislature clearly and unambiguously exercised such authority when it passed the Miller-Ayala Act and amended the State Bar Act to reflect those amendments. But absolutely nothing exists in the century-long legislative history of the Talent Agencies Act suggesting the legislature intended attorneys to be subject to the licensing and regulatory requirements generally imposed on talent agents. Never did any of these legislative acts simultaneously amend the State Bar Act or the Rules of Professional Conduct to reflect such an intent. Nor has any California state court ever ruled on the issue.

Instead, the only authority suggesting as much are a scant number of decisions by the California Labor Commission which rely on overly simplistic logic and unlawful statutory construction with no regard, discussion or consideration of the actual legislative intent behind the Talent Agencies Act, supra. While “[t]he construction of a statute by an agency charged with its administration is entitled to great weight,” such constructions are hardly dispositive. Furthermore, to the extent an administrative agency engages in statutory construction, it must adhere to actual principles of statutory construction and an informed, detailed examination of legislative intent, such as that set forth above and herein. The Labor Commission utterly failed to consider statutory construction principles or the legislative history and intent of the Talent Agencies Act.

IV. The Solis Decision Creates Irreconcilable Statutory Conflicts Between the Talent Agencies Act and the State Bar Act

A. The Talent Agencies Act’s application to licensed attorneys will be a matter of first impression in the California state courts

As noted, the Talent Agencies Act confers on the California Labor Commission original jurisdiction of claims arising from violations of the statute. However, all decisions of the Labor Commission are “subject to an appeal within 10 days after determination, to the superior court where the

same shall be heard *de novo*.” While the TAA was enacted in 1978, the Labor Commission did not hear a case against a California-licensed attorney in which “practice of law” was asserted as a defense until 2013, when the Labor Commission rendered its decision in *Solis v. Blancarte*.

The only other case in which “practice of law” by a California-licensed attorney was asserted as a defense was *Doughty v. Hess*. However, neither *Solis* nor *Doughty* was appealed to the California district court. Of the 46 cases in which the district court took appeals from Labor Commission decisions, none of them defined the statute’s phrase “procurement,” let alone held that negotiation constitutes *per se* procurement. Nor did any of them examine whether the Talent Agencies Act is so broad as to prohibit duly-licensed California attorneys from negotiating entertainment employment contracts; i.e., practicing law. Therefore, application of the Talent Agencies Act to duly-licensed attorneys in California remains a question-of-first-impression before the California state courts. And no California court is constrained by any binding precedent.

**B. The Labor Commission’s *Solis* decision creates an absurd result opening both attorneys and talent agents to liability under California law**

Contract negotiation and drafting has long been deemed the “practice of law” in California. In 1998, the California Supreme Court established unequivocally in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* that the practice of law in California includes giving “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.” The *Birbrower* Court considered whether a New York law firm’s activities within the State of California constituted the unlicensed practice of law within the state. Defendant law firm Birbrower was engaged by a California corporation, ESQ, to provide legal services in connection with litigation against ESQ by Tandem Computers Incorporated. In the course of providing legal services, one of Birbrower’s attorneys, Kevin Hobbs, “returned to California to assist ESQ in settling the Tandem matter. While in California, . . . Hobbs also met with Tandem representatives to discuss possible changes in [a] proposed

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139. *Id.* at § 1700.44(a).

140. TAC 39547 (Cal. Lab. Comm’r, April 4, 2017), https://www.dir.ca.gov/dlse/TAC/TAC-39547%20Doughty%20v.%20Hess%20040517.pdf; see Lab. Comm’r’s Office, DLSE-Talent Agency Cases, State of Cal., Dep’t. of Ind. Relations, https://www.dir.ca.gov/dlse/DLSE-TACs.htm (last viewed Mar. 20, 2020)(the author’s review of the Labor Commissioner’s published Talent Agency Cases reveals only two cases since 1971 in which the putative agent (i) was a licensed attorney (ii) asserting “practice of law” as a defense to a violation of the Talent Agencies Act, to wit, *Solis* and *Doughty*).

141. 949 P.2d 1, 5 (Cal. 1998).
It should come as no surprise that there is exactly one phrase defined by “discussing possible changes” to a “proposed agreement”: contract negotiation.143

In 2001, the California Court of Appeals tied Birbrower to the negotiation of film-related contracts in California. In Simons v. Steverson, petitioner Shawn Simons was an independent film producer and California resident. He engaged the New York law firm of Rudolph & Beer, LLP “to perform certain legal services for” Simons related to a film he was preparing.144 One of the attorneys at the firm, Mark Steverson, was a California-licensed attorney who would be Simon’s actual attorney.145 The services Steverson was engaged to perform “included, but were not limited to . . . the negotiating and drafting of all agreements relating to financing and production of the Picture, including but not limited to actors’ agreements, location agreements, and crew agreements.”146 Relying on Birbrower, Simon contended that Steverson’s actions constituted the practice of law in California. The district court “disagreed that the act of negotiating qualified as the practice of law.”147 But the California Court of Appeals reversed the district court. Citing Birbrower, the Simons Court held that Steverson had, in fact, “provided legal services under California law,” by “review[ing], negotiat[ing] and complet[ing] [an] . . . agreement.”148 Definitely, California courts have long recognized that negotiating, preparing and drafting artist agreements (i.e., “actors’ agreements . . . and crew agreements”) is within the ambit of the “practice of law” in California.

On the other hand, the California Labor Commission holds in Solis that negotiating, preparing and drafting artist agreements constitutes “procurement” activities under the Act that are somehow distinct (in total) from the attorneys’ full and robust scope of practice. The TAA specifically grants original jurisdiction for disputes arising under the Act to the Labor Commission.149 The Commission has long been given discretion to interpret the Act.150 The Act specifically prohibits unlicensed people from “procuring, offering, promising, or attempting to procure employment or engagements

142. Id. at 3.
143. People v. Starski, 212 Cal. Rptr. 3d 622, 632 (Cal. Ct. App. 2017) (“‘As the term is generally understood . . . in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.’ Our Supreme Court has also repeatedly held that purporting to represent someone, even if only impliedly, while negotiating a settlement is likewise included within the practice of law”).
145. Id.
146. Id.
147. Id. at 203.
148. Id. at 208.
149. CAL. LAB. CODE. § 1700.44(a); also CAL. CODE REGS. § 12022.
150. See Waisbren, supra at 442.
for an artist or artists.”¹⁵¹ And the Labor Commission has long defined the phrase “procure,” as used in the Talent Agencies Act, to include “the acts undertaken in the course of negotiating an agreement for the employment of an artist.”¹⁵²

Under Simons, the California Court of Appeals implicitly holds that negotiation of actors’ and crew agreements constitutes the “practice of law.” But under Solis, the California Labor Commission holds that negotiation of actors’ and crew agreements constitutes “procurement.”¹⁵³ In other words, “the practice of law” constitutes “procurement,” and vice-versa. And both unlicensed procurement and the unlicensed practice of law are respectively prohibited by two different statutory schemes. Applying Solis, the Talent Agencies Act prohibits attorneys from negotiating contracts for artists (i.e., “procuring”) without a talent agency license. Applying Simons, the State Bar Act prohibits talent agents from negotiating contracts for artists (i.e., “practicing law”) without a law license.¹⁵⁴ This creates unintended legal dangers for both attorneys and talent agents.

If Solis is not rejected, both attorneys and talent agents face strong sanction if not dually-licensed as both an attorney and a talent agent. Under the Talent Agencies Act, the attorney is subject to simple administrative penalties for unlicensed procurement. As occurred in Solis, the attorney’s representation agreement could be invalidated and the attorney required to disgorge any contingent or hourly fees received for legal services. But the talent agent faces the greater prospect for sanction. Penalties for the unlicensed practice of law under the State Bar Act subject the talent agent not just to civil penalties, but also to criminal punishment. As set forth in Section 6125 of the State Bar Act, “[a]ny person . . . practicing law who is not an active licensee of the State Bar . . . is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or both that fine and imprisonment.”¹⁵⁵

In 1967, the California Court of Appeals announced its decision in Buchwald v. Superior Court, a case analyzing the Artists’ Managers Act (a precursor to the Talent Agencies Act). The Buchwald Court explicitly held that such absurdities arising from statutory construction must be avoided: “Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers – one that will lead to wise policy rather than to mischief or absurdity.”¹⁵⁶ And it has long been public policy in California that the State Bar Act preempts the

¹⁵¹  CAL. LAB. CODE § 1700.44(b).
¹⁵²  Solis, TAC-27089 at 6, 6.
¹⁵³  CAL. LAB. CODE § 1700.44(b).
¹⁵⁴  CAL. BUS. & PROF. CODE § 6125(a).
¹⁵⁵  Id. at § 6125(a).
¹⁵⁶  62 Cal. Rptr. at 369.
field in all matters involving the practice of law. Therefore, the Talent Agencies Act must be construed to recognize the public policy of the State Bar Act’s supremacy and avoids the clear absurdity arising from a scenario in which California law both empowers and sanctions attorneys and talent agents for doing what the law purportedly empowers them to do. The only way to avoid such absurdity is to reject the California Labor Commission’s Solis interpretation of the Talent Agencies Act as to what does (and does not) constitute “procurement” under the statute. Failing to do so creates additional absurdities. First, to uphold the administrative court’s interpretation effectively would overturn over fifty years of state supreme court precedent. But more importantly, failing to reject Solis obviates a legislative intent spanning more than one hundred years.

C. The State Bar Act and the California Rules of Professional Conduct together constitute a separate-and-analogous licensing and regulatory scheme sufficiently fulfilling the legislative purposes of the Talent Agencies Act

The Talent Agencies Act itself is not the only regulatory mandate to consider. In addition to the statute, the Labor Commission is empowered to draft regulations for purposes of enforcing the statute. And the Labor Commission has done just that, promulgating the General Rules and Regulations for Artists’ Managers. Together, the Talent Agencies Act and the General Rules constitute the regulatory and licensing scheme for talent agents in California. However, California courts have suggested that similar schemes may act as whole substitutes for the TAA statutory and regulatory scheme.

In 1995, the California Court of Appeals published its decision in Waisbren v. Peppercorn Productions. In that case, the putative agent at issue was a talent manager. The appeals court found that “[u]nlike a talent agent, a ‘personal manager’ is not covered by the [Talent Agencies] Act or any other statutory licensing scheme.” In 2008, the California Supreme Court published its decision in Marathon Entertainment, Inc. v. Blasi. The Marathon Court described the regulatory scheme of the Talent Agencies Act as the “requirements for how licensed talent agencies conduct their business,

157. Baron, 469 P.2d at 357.
158. See Mickel v. Murphy, 305 P.2d 993, 995 (Cal. Ct. App. 1957) (quoting People v. Sipper, 142 P.2d 960, 962-963 (Cal. Ct. App. 1943)) (“If defendant had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished him by the parties,” as opposed to negotiating the printed terms (i.e., negotiating the offered terms), . . . he would not have been guilty of practicing law without a license”).
159. CAL. LAB. CODE § 1700.29; CAL. CODE REGS. §§12000 et seq.
160. Waisbren, 48 Cal. Rptr. 2d at 440 (emphasis added).
including a code of conduct, submission of contracts and fee schedules to the state, maintenance of a client trust account, posting of a bond, and prohibitions against discrimination, kickbacks, and certain conflicts of interest. But interestingly, the Marathon Court made an additional finding sua sponte. Citing the Waisbren decision, the Marathon Court stated that “[n]o separate analogous licensing or regulatory scheme extends to personal managers.”

The clear implication of these cases is that if a case ever arose in which a “separate analogous licensing or regulatory scheme” extends to a putative talent agent, the Talent Agencies Act is not intended to require licensing or to regulate such a person. California has at various times in its history adopted and repealed laws and regulations targeting talent managers. However, the state has consistently maintained a separate analogous licensing and regulatory scheme for attorneys for nearly a century. That scheme is the State Bar Act and the Rules of Professional Conduct.

In California, licensing and regulation of attorneys predates by decades not just the Talent Agencies Act, but all legislative attempts at licensing and regulation of talent agencies. In 1927, the state legislature adopted the State Bar Act. And “[i]n 1966, the electorate adopted a provision placing the State Bar in the judicial article of the state Constitution. Article VI, section 9 of the California Constitution states: ‘The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar.’”

Today, the State Bar Act is codified in the Business & Professions Code and consists of more than 200 separate subsections. In addition to the substantive provisions of the act itself, the State Bar Act also authorizes the California State Bar to “formulate and enforce rules of professional conduct for all members of the State Bar,” including suspension from practice for any willful breach of those rules. It is fair to say that together, the State Bar Act and the California

161. Marathon, 174 P.3d at 747.
162. Id. (citing Waisbren, 48 Cal. Rptr. 2d at 440-441).
163. In re Application of Weymann, 268 P. 971, 971 (Cal. App. 1928) (“the subject of admission to the practice of law in this state, including the procedure therefor, was governed by the provisions of the Code of Civil Procedure”); see In re Disbarment of Collins, 206 P. 990, 990 (Cal. 1922) (“The petition herein applies for an order vacating and setting aside a former order of this court made on July 19, 1909, striking from the roll of attorneys and counselors the name of said petitioner”); People v. Treadwell, 5 P. 686, 686 (Cal. 1885) (“This is a proceeding for the removal of an attorney of this court, brought under Section 288, C. C. P.”); Marathon, 174 P.3d at 746 (“The [Talent Agency] Act’s roots extend back to 1913, when the Legislature passed the Private Employment Agencies Law and imposed the first licensing requirements for employment agents”).
165. Id. at 52.
166. CAL. BUS. & PROF. CODE §§ 6000-6243.
167. Id. at §§ 6076, 6077; also cf. Cal. R. Prof. Conduct 1.0(a).
Rules of Professional Conduct constitute a constitutionally required separate licensing and regulatory scheme for attorneys, which is analogous to the Talent Agencies Act and the General Rules and Regulations for Artists’ Managers as contemplated in Waisbren and Marathon.

Ultimately, the question becomes whether the State Bar Act and the Talent Agencies Act are truly analogous. The first issue is whether the two statutes share similar legislative purposes. There can be no doubt that the State Bar Act and the Talent Agencies Act do so. While courts have recognized that talent agents might otherwise face increased competition from others who may engage in similar activity, they have unequivocally held that the actual purpose of the Act is to protect artists. \(^{168}\) No court has ever held that any legislative purpose of the Act is to statutorily create a monopoly favoring talent agents. Similarly, the State Bar Act was enacted for the protection of the public in general, including artists. As set forth therein, “[p]rotection of the public shall be the highest priority for the State Bar of California . . . in exercising [its] licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” \(^{169}\) More specifically, the purpose of the Act and its regulations is to protect artists from “unscrupulous” talent agents. \(^{170}\) Meanwhile, the purpose of the State Bar Act and, more specifically, the Rules of Professional Conduct, is to protect clients from unscrupulous attorneys. \(^{171}\)

The second issue is whether both schemes share similar licensing and regulatory requirements to achieve these similar legislative goals. And there

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168. *Waisbren*, 48 Cal. Rptr. 2d at 441-442 (“‘Such statutes are enacted for the protection of those seeking employment [i.e., the artists], . . . The position of the talent agents is that anyone who performs the same function as they in procuring employment for an artist should be subject to the same statutory and regulatory obligations as they are – nothing more and nothing less. . . . Talent agents increasingly find themselves in competition with personal managers and others in seeking employment for clients. In the opinion of the talent agents, the issue is simply one of fairness: all who seek employment for an artist should be licensed or none should be licensed’”)


171. *See Sharp v. Next Entm’t, Inc.*, 78 Cal. Rptr. 3d 37, 51(Cal. Ct. App. 2008) (“conflict of interest rules are designed to ‘assure the attorney’s absolute and undivided loyalty and commitment to the client and the protection of client confidences’ [sic]); see *Kirk v. First Am. Title Ins. Co.*, 108 Cal. Rptr. 3d 620, 644 (Cal. Ct. App. 2010) (“Courts have recognized the ‘interest in preserving the continuity of the lawyer-client relationship; otherwise, if such relationships were easily disrupted . . . the costs of litigation would be even higher, and unscrupulous attorneys would have an incentive to seize on strained facts and theories’”); see *Bird, Marella, Boxer & Wolfert v. Superior Court*, 130 Cal. Rptr. 2d 782, 792 (Cal. Ct. App. 2003) (“If only ‘actually innocent’ clients can challenge their defense counsel’s excessive or unlawful fees then ‘actually guilty’ clients could never seek redress against even the most unscrupulous attorneys”)}
can be no doubt that the State Bar Act provides similar means – if not superior means – to achieve the legislature’s objectives. The first shared regulatory scheme is embodied in the respective licensing requirements themselves.\textsuperscript{172} In order to obtain a license, both prospective talent agents and attorneys must submit written applications to their respective licensing authorities.\textsuperscript{173} Both regulatory schemes permit the regulating authority to require applicants to submit to background checks into their criminal history,\textsuperscript{174} (including submission of the applicant’s fingerprints),\textsuperscript{175} and their character and moral fitness.\textsuperscript{176} Both talent agencies and law firms are subject to annual reregistration requirements.\textsuperscript{177} Both talent agency licenses and law licenses may be revoked or suspended by the regulating authority for failure to comply with their respective statutes, for failures of moral character, and for fraud or misrepresentation on an application for such a license.\textsuperscript{178} Both regulating authorities have authority to conduct investigations into the conduct of their respective licensees.\textsuperscript{179} Last, the Rules of Professional Conduct provide for a similar contract cancellation remedy in the event of their breach.\textsuperscript{180} Because the purpose of both statutory and regulatory schemes is the same, and the statutory, regulatory and rules mechanisms between both schemes is sufficiently similar, the State Bar Act/Rules of Professional Conduct constitute the separate-but-analogous licensing scheme contemplated by the \textit{Marathon} and \textit{Waisbren} courts.

In fact, the State Bar Act and Rules of Professional Conduct together provide for a better and more efficient regulatory scheme to protect writers and other Hollywood artists than the Talent Agencies Act ever will. Bear in mind that the dispute between the ATA and the WGA came to a head specifically because talent agents have long been engaged in conduct that violates their fiduciary responsibilities to their clients – the writers.\textsuperscript{181} The

\begin{itemize}
\item [\textsuperscript{172}]CAL. LAB. CODE § 1700.5; CAL. BUS. & PROF. CODE §§ 6060, 6125.
\item [\textsuperscript{173}]CAL. LAB. CODE § 1700.6; Cal. R. of Court R. 9.9.5 (to comply with Cal. Bus. & Prof. Code § 6054); see also State Bar of California, Website, Fingerprinting Rule Requirement FAQs, http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Fingerprinting-Rule-Requirements/Fingerprinting-FAQ (last viewed Mar. 6, 2020).
\item [\textsuperscript{174}]CAL. LAB. CODE § 1700.7; CAL. BUS. & PROF. CODE § 6054.
\item [\textsuperscript{175}]CAL. LAB. CODE § 1700.6; CAL. BUS. & PROF. CODE § 6054.
\item [\textsuperscript{176}]CAL. LAB. CODE § 1700.7; CAL. BUS. & PROF. CODE §§ 6054, 6060, 6060.2.
\item [\textsuperscript{177}]CAL. LAB. CODE § 1700.10; CAL. BUS. & PROF. CODE § 6161.1.
\item [\textsuperscript{178}]CAL. LAB. CODE § 1700.21; CAL. BUS. & PROF. CODE § 6077; generally CAL. BUS. & PROF. CODE 6075 et seq.
\item [\textsuperscript{179}]CAL. BUS. & PROF. CODE §§ 6043, 6044, 6060.2, 6168.
\item [\textsuperscript{180}]\textit{Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.}, 425 P.3d 1, 9 (Cal. 2018) (“a contract or transaction involving attorneys may be declared unenforceable for violation of the Rules of Professional Conduct”).
\item [\textsuperscript{181}]See \textit{generally} Smith, supra note 25, at 193-221 (in-depth consideration of fiduciary duties Hollywood talent agents owe their clients and conflicts arising therefrom in context of packaging).
\end{itemize}
Talent Agencies Act does absolutely zero to protect writers from this type of agency conduct and has left a gaping hole permitting the proliferation of packaging deals among Hollywood talent agents.

A major point of contention is that writers and other artists have discovered the TAA acts not as a bulwark against unscrupulous talent marketers, but instead is an entrée for predatory representatives. In 2015, the Los Angeles Times printed an exposé series on scams in the entertainment industry titled Selling Stardom. In one of those stories, multiple clients of former talent agent Lynn Venturella complained of her predatory behavior. According to the piece, Venturella was “one of the hundreds of talent agents operating on the fringes of Hollywood, where the clients are mostly character actors, fledgling screenwriters, workaday directors, even unknown wannabes.”182 After becoming victims of embezzlement and other fraudulent practices, “several past clients of Venturella said the fact that her agency was state-licensed – and maintained a required $50,000 bond,” pursuant to the Talent Agencies Act, “made them comfortable with signing” with her.183 The absence of a comprehensive code and reporting infrastructure has only emboldened licensed talent agents to engage in the abuses the Talent Agencies Act was intended to halt. Attorneys, on the other hand, have always been prevented from engaging in abuses the Talent Agencies Act and General Rules fail to prevent.

The first major difference between the Talent Agencies Act scheme and the State Bar Act scheme is that attorneys must successfully demonstrate competence to practice law before being granted a license, whereas talent agents do not. First, California attorneys are required to complete an extensive training program in the practice of law, either by graduating from an accredited law school or completing a legal apprenticeship with an attorney or judge in the state.184 Then, attorneys must successfully pass an “examination in professional responsibility or legal ethics,” traditionally the Multistate Professional Responsibility Examination (MPRE).185 Finally, attorneys must pass the California bar exam, which is designed to ensure the attorneys are minimally competent in the practice of law.186 There is no corollary educational or testing requirement for talent agents to prove minimal competence. Nothing in the Talent Agencies Act or the General Rules and Regulations for Artists’ Managers requires a person to go through a training or educational process, to pass an examination on business ethics

183. Id.
184. CAL. BUS. & PROF. CODE § 6060(e) (1939).
185. Id. at § 6060(f).
186. Id. at § 6060(g).
or fiduciary duties of agents, or to pass an examination which generally tests their competence to procure employment for artists. While many of the large agencies offer training, neither the Act nor the regulations require it prior to the state’s granting of a license under the Act.

The second major difference is the Rules for Professional Conduct for attorneys. There simply is no analogous regulatory scheme for talent agents under the Talent Agencies Act. The Marathon Court suggested that the Act and regulations establish a “code of conduct” for talent agents. Certainly the Act and regulations mandate specific requirements agents must fulfill to conform to the Act itself, such as posting copies of their licenses and the Act in their office, posting a surety bond, and prescribing forms for agency agreements. However, these do not rise to the level of ethical duties broadly regulating the relationship between the talent agents and the artists. The Code of Professional Conduct for attorneys, on the other hand, specifically regulates the attorney-client relationship and prescribes broad duties attorneys owe to their clients.

Chapter 1 of the Rules of Professional Conduct specifically relates to the Lawyer-Client Relationship. Therein, the rules set forth broad duties that attorneys owe to their clients, the most important of which is “[t]he duty of undivided loyalty” to the client as set forth in Rule 1.7. This most important rule specifically prohibits the same conflicts-of-interest the talent agents are accused of that led directly to the showdown in 2019. Rule 1.7 provides that: “[a] lawyer shall not, without informed written consent from each client . . . represent a client if the representation is directly adverse to another client in the same or a separate matter.” And a “lawyer shall not, without informed written consent from each affected client . . . represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person, or by the lawyer’s own interests.” In one rule, the foundations are laid to prevent all abuses alleged against the talent agents, if talent agents were subject to such a rule or its corollary.

The commentary to Rule 1.7 states that a “directly adverse conflict” can arise in a number of ways, including a lawyer’s “representation of more than one client in a matter in which the interests of the clients actually conflict.”

It should go without saying that if an attorney represented both the buyer and

188. Id. at § 1700.15.
189. Id. at § 1700.23.
191. Id. at R. 1.7(a).
192. Id. at R. 1.7(b).
193. Id. at R. 1.7, cmt. 1.
seller of real estate that such an attorney would run afoul of Rule 1.7. However, nothing under the Talent Agencies Act or the regulations prohibits a talent agent from representing both the buyer and seller of a screenplay or of a television writer’s services. Rule 1.8.1 explicitly forbids an attorney from “knowingly acquire[ing] [a] . . . pecuniary interest adverse to a client.”194 Combined with Rule 1.8.6, which mandates that even if an attorney is compensated by somebody other than the client that the attorney’s sole duty is to the client, an attorney would never be permitted to accept a fee from an opposing party in a negotiation. However, nothing in the TAA or its regulations has prevented talent agents from negotiating packaging fees from studios and networks, often to the financial detriment (and creative detriment) of its own clients.

And Rule 1.8.1 also explicitly forbids an attorney from “entering into a business transaction with a client,” because it would require the attorney to negotiate against himself. In other words, an attorney would run afoul of the rule if the attorney entered negotiations to hire his own client while purporting to represent the client. It prevents self-dealing. However, nothing in the TAA prevents talent agents from entering into business transactions with the artists they represent. As the major talent agencies have turned into content production companies – hiring entities – this has given rise to the self-dealing conflicts that have arisen as the talent agencies have become representatives of their clients in negotiations with the talent agencies themselves. Suffice to say, the State Bar Act and the Rules of Professional Conduct for attorneys do not merely provide an alternative regulatory scheme to the Talent Agencies Act; together they actually constitute a better regulatory scheme to protect attorneys’ clients who are Hollywood writers and other artists.

D. The Labor Commission’s Solis decision results in the Talent Agencies Act’s interference with the Rules of Professional Conduct, and therefore unreasonably interferes with the State Bar Act and the attorney-client relationship

When applying Solis, the Talent Agencies Act unreasonably interferes with the California Rules of Professional Conduct for attorneys because it statutorily subrogates an attorney’s ethical duties to the client to the discretion of the talent agent. In Solis, the Labor Commission cites its decision in Danielewski for the proposition that under the Talent Agencies Act, “an unlicensed person may nevertheless participate in negotiating an employment contract for an artist, provided he or she does so ‘in conjunction with, and at the request of a licensed talent agent.’”195 This unreasonably

194. Id. at R. 1.8.1.
interferes with an attorney’s responsibilities under the Rules of Professional Conduct to act on behalf of and at the instruction of the client alone.

The Rules of Professional Conduct set forth one overarching rule: undivided loyalty to the client. As set forth in the first chapter, “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” Rule 2.1 requires that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice” to the client alone. All other attorney duties flow from this maxim. For instance, Rule 1.2 states that “a lawyer shall abide by a client’s decisions concerning the objectives of representation,” and that “a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

But in furtherance of Rule 1.7’s duty of undivided loyalty, attorneys are not simply mandated to render independent professional judgment in the course of their representation of a client. The rules of professional conduct create a de facto regime in which attorneys are absolutely prohibited from taking direction from or relinquishing control of the representation to any person other than the client. For instance, Rule 1.8.6 expressly prohibits an attorney from “enter[ing] into an agreement for, charg[ing], or accept[ing] compensation for representing a client from one other than the client unless there is no interference with the lawyer’s independent professional judgment or with the lawyer-client relationship.” Rule 5.3, while traditionally examined in the context of legal assistants and outside experts, clearly places the ultimate responsibility of a representation on the lawyer and not on the non-lawyer. And Rule 5.5 explicitly prohibits attorneys from “knowingly assist[ing] a person in the unauthorized practice of law” within the state.

A talent agent who is unlicensed as an attorney is clearly engaged in the unauthorized practice of law in California, supra.

These rules were specifically drafted decades ago, in their original form, to protect the public and the client. But the Labor Commission’s Solis decision unreasonably interferes with these rules. By suggesting that an attorney may negotiate a talent contract only “in conjunction with, and at the request of a licensed talent agent,” the Labor Commission effectively neuters the long-standing rule that an attorney’s duties are owed solely to the client, and that the client shall direct and control the representation. Furthermore, it interferes with the rules because it creates a direct conflict wherein the

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196. CAL. R. PROF. CONDUCT 1.7, cmt. 1.
197. Id. at R. 2.1.
198. Id. at R. 1.2(a)(emphasis added).
199. Id. at R. 1.8.6(a).
200. Id. at R. 5.3(c)(1)(“With respect to a nonlawyer . . . associated with a lawyer[,] a lawyer shall be responsible for conduct of such a person if . . . the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved”).
201. Id. at R. 5.4(a)(2).
attorney not only is unauthorized to supervise the non-lawyer in the representation (i.e., the talent agent), but is also subject to that person’s direction. Solis sets the stage for an inevitable showdown: who controls the negotiation with a studio or network when an attorney knows that the agent is dragging his or her heels to get a packaging fee even though the client is ready to close the deal?

The Labor Commission’s Solis/Danielewski subrogation requirement endangers the attorney’s representation because it would lead to conflict between the TAA director of the representation (i.e., the talent agent) and the State Bar Act director of the representation (i.e., the writer or other talent). What is the attorney’s duty if the agent insists that a packaging fee be negotiated? What is the attorney’s duty if the attorney knows the agent is trying to get the writer to take a lower fee? What is the attorney’s duty in a negotiation if the client’s agency is also the adverse party, such as a production company owned by the agency? Is the attorney’s duty to take direction solely from the agent, in accordance with Solis and Danielewski? Or is the attorney’s duty to take direction solely from the client, in accordance with the Rules of Professional Conduct? The Labor Commission’s interpretation of the Act creates these direct conflicts with the Rules of Professional Conduct, despite the fact that the rules are set forth by the California State Bar pursuant to its authority under the state constitution202 and the State Bar Act.203 These conflicts cannot be resolved except by rejection of the Labor Commission’s holding as set forth in Solis and Danielewski.

V. Attorney Exemption from the Talent Agencies Act More Reasonably Conforms to the Legislative Purpose of the Statute and Greater Public Policy

In Solis, the Labor Commission placed too much emphasis on the black letter of the Talent Agencies Act instead of construing the statute in the context of its actual legislative purpose. The Solis construction effectively leaves the rank-and-file artist without competent representation and creates a fertile environment in which the abuses it was intended to protect against actually incubate and thrive instead. Case in point, even with the Talent Agencies Act in place, the writers it was intended to protect protested abuses the statute failed to protect against. Had the statute fulfilled its purpose, those complaints would not have arisen in the first place. The Solis decision has merely given the talent agents legal grounds on which to fight for their piece

202. See CAL. CONST. ART. VI, § 9 (“The State Bar of California is a public corporation”).
203. See Cal. Bus. & Prof. Code § 6076 (“With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the State Bar”).
of the pie, at the expense of their principals - the creative clients they are supposed to be fighting for instead. In short, the Talent Agencies Act and the Labor Commission have failed the people placed under their care by the state legislature.

In addition to the legal reasons California should reject Solis, the state should exempt attorneys from the statute’s licensing requirements and regulation for a myriad of sound public policy reasons. First among them is that the State Bar Act and Rules of Professional Conduct for attorneys provide not simply a “separate analogous licensing [and] regulatory scheme,” but that the State Bar Act and Rules of Professional Conduct provide a licensing and regulatory scheme that is actually better at achieving the legislative aims of the Talent Agencies Act, supra. Other public policy benefits include the following:

A. Attorney exemption results in no legal or actual conflict between agents and attorneys

Nothing in either the Talent Agencies Act or the State Bar Act actually prevents artists from engaging the services of both an agent and an attorney. The common practice within the motion picture industry is for artists to have both. Even by rejecting Solis and expressly exempting attorneys from regulation under the Talent Agencies Act, nothing prevents the writer, actor or director from engaging the services of both an agent and an attorney, except perhaps agents who refuse to work with attorneys.204 The only conflict arises from ATA’s suggestion that the Talent Agencies Act’s actual purpose was to create a statutory monopoly for talent agents.205 While there is no doubt that an unintended consequence of the statute was creation of such a monopoly, no court has ever held that preventing competition against talent agents was considered – let alone adopted – as a reason for enacting the statute. Nor has any legislative material or history suggested this. Instead, the only legislative purpose ever identified by the courts is the protection of artists from “unscrupulous” talent marketers. Because the ATA’s interpretation falls so far afield from the actual, true object of the statute, this economic conflict is irrelevant. Preventing competition from attorneys is not a purpose. Nor is it even unfair if it were, in fact, to occur because agents are not effectively shut out of the business. If ever the competition is unfair, it is because attorneys have the greater burden to bear in their licensing and regulation.

205. See Putman Letter, supra note 57 (“The [ATA] considers any and all unlawful procurement entered into at the behest of the WGA to be unfair and unlawful competition that will harm the ATA and its member agencies”).
B. Attorney exemption is more consistent with attorney licensing exemptions in other states and licensed professions

Exempting attorneys from the statute would bring consistency to licensing and regulation of “practice of law” activities across a variety of professions in California, as well as other states. In many circumstances, non-lawyers have been allowed to offer legal services. Historically, these have included non-lawyers at banks, who “are permitted to draft routine mortgages and non-lawyers are permitted to execute these legal documents with blank clients.”206 In the real estate industry in most states, including California, non-lawyers have been “given the power to execute contracts on residential property in which the agent holds a commission,” similarly to sales agents in the Hollywood industries.207 Accounting firms have been permitted to expand their consulting services to include estate planning, litigation support, valuation and business planning advice, and financial planning.208 Certified, licensed legal assistants are permitted to do a wide variety of activities that would constitute the practice of law in the state. An interpretation of the Act as a conformance with the State Bar Act, infra, would bring it in line with similar exemptions for other professions, and bring consistency.

C. Attorney exemption provides better protections and access to legal aid for below-the-line cast and crew

The Talent Agencies Act, as construed in the Labor Commission’s Solis decision, is simply too broad. It does not cover employment agencies only for above-the-line creative talent like actors, writers and directors. The term “talent,” as used in Section 1700.4, brings under its auspices anybody who represents any person who works on a movie or television show. In effect, it requires every person who works on a film or television show to obtain an agent simply to have an attorney review a contract for employment. The state of California has no interest in compelling assistant make-up artists and key grips to (i) find an agent, and (ii) pay a commission to an agent simply to have access to an attorney who can review an employment or engagement contract. No worker in any other industry in California is subjected to such an onerous requirement simply to obtain work or have an employment contract reviewed and negotiated by their legal counsel.

207. Id.
208. Id. at 104.
D. Attorney exemption provides better protections and access to legal assistance for up-and-coming above-the-line talent

The Talent Agencies Act creates yet another *de facto* caste system in Hollywood. Agents’ livelihoods are dependent on talent, and they have become more risk-averse over time. This is evident from their recent forays into content acquisitions, packaging deals, and the evolution of talent agency into a volume business. Whereas the Talent Agencies Act permits agents to engage in development of their clients, agents today are overwhelmingly less interested in doing so. After all, since they are dependent on an artist’s talent for packages (and the few remaining commissions taken), they do not take risks on new talent. Instead, agents favor a greater number of established clients who have proven their ability to encourage packaging deals.

More often, up-and-coming talent have found agencies to be closed shops, taking only solicited materials and rejecting even simple query letters. This, in effect, leaves the up-and-coming writer, actor or director without competent representation. Other commentators have noted the disparity caused by the Talent Agencies Act itself:

Yet, who is the [Talent Agencies] Act really protecting if the manager of a band that cannot get an agent will not (because he or she cannot) negotiate (or assist the band in negotiating) a performance in a bar, or at a wedding, or at a party. And what about the talent agent at one of the big three agencies in Los Angeles, who (recently), when one of their actress clients told them that she now had an attorney and that she would like them to negotiate her future deals in conjunction with that attorney, responded, “we don’t work with lawyers.” Is it really the artist that is being protected by the Act, or is it the agent?

What about an actor who does not have the clout of Tom Cruise or Sylvester Stallone, or even Gary Cole or Jennifer Rubin? Tom Cruise gets the Creative Artists Agency’s full and complete attention every time he sneezes; do other actors that are not of his stature? . . . So when the agent says, ‘I don’t work with lawyers’ or ‘I don’t work with managers,’ what is the actor to do, and how does the Act protect him in that situation?

There are many fine actors that cannot even get an agent. Does the Act really protect them? And what about the actors who lives [sic] outside of Los Angeles, where there is not such an abundance of agents – does the Act protect them?209

While such commentary appears to focus on actors and musicians, the critique of the statute – just as the statute itself – applies to *all* procurers of

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employment for all artists. And therefore, the critique is equally applicable to Hollywood writers.

If engaging the services of an agent is a prerequisite for an up-and-coming artist to engage the services of an attorney, then what is the artist to do if no agent will represent them? In such a way, the Talent Agencies Act serves only as an obstacle to the artists’ protection. But for Solis, the Talent Agencies Act would not prohibit a licensed attorney from drafting, making, fielding and/or negotiating offers and contracts for such up-and-coming talent who may receive no interest from a talent agent. Attorneys are less dependent on an artists’ talent because whereas talent agents are required by law to be compensated only through commissions, attorneys are permitted to take hourly fees to review and negotiate contracts. If up-and-coming artists are effectively regulated out of the ability to retain the services of attorneys because an agent will not sign them first, then they are wholly without representation. This is clearly an unintended consequence of the legislature, and must be avoided.

E. Attorney exemption prevents unintended protectionist and anti-competitive consequences of the Labor Commission’s Solis decision, which have harmed the artists the Talent Agencies Act was enacted to protect

The Labor Commission’s interpretation of the Act places an undue burden on the public because it is protectionist and anti-competitive, which irrationally limits access to competent legal counsel and limits artists’ options to choose their own representatives. First, by creating a dual-licensing regime, attorneys are forced to take on extra costs in their practice for what they otherwise would be permitted to do. As in any industry, those costs are then passed along to the public, in a time when Americans across the country struggle to afford legal assistance of any kind. Other commentators have advocated for an increased allowance on the part of states to permit non-lawyers to practice law in limited circumstances in order


to respond to this crisis.\textsuperscript{212} In an age when the film industry is more and more dominated by middle class, rank-and-file filmmakers instead of high-budget studios and networks, legal costs must not be allowed to be artificially inflated by a statutory requirement that attorneys carry an additional license that offers nothing to the client. This is a matter of the public’s access to justice and competent legal counsel.

Second, much to the chagrin of the talent agents, this holding would likely lead to greater competition between attorneys and talent agents. But such reservations are hypocritical. When the Talent Agencies Act was first enacted in 1978, it unintentionally created the monopoly that arguably exists today. Prior to that, agents and managers competed to procure engagements (the incidental procurement provision of the Labor Code then still being law), and yet there was no great outcry from the ATA. While monopolization favoring talent agents has long been debunked as the legislature’s intent in enacting the TAA, supra, the public is actually better off for such competition. Cars replaced horses and buggies, and video killed the radio star. Just as writers once had the option to rely on both agents and managers, the public should not be denied the choice of using an agent or attorney to negotiate their employment contracts and sales of their intellectual property.

Some creatives may prefer to utilize the services of an attorney alone. For instance and perhaps most famously among them is Bill Murray, who fired his agents in favor of his attorney to field offers from filmmakers.\textsuperscript{213} Artists of a lower professional stature will not be regulated out of the market for competent representation, because unlike talent agents who rely exclusively on the talent of their clients to make a living, attorneys may not find themselves so constrained. This gives the up-and-coming screenwriter an opportunity to engage his attorney uncle for a first-time gig instead of having to cross his fingers and hope that an agent will take an interest in him simply to negotiate a low-dollar option agreement. This gives established artists, like Murray, the right to choose for themselves whether they need agents in their lives at all, or if they simply need an attorney to negotiate offers when they come in. On the other hand, the middle-tier artist may prefer a talent agent whose job is to actually track down offers and be a salesman, whereas an attorney may simply field offers as they come to the artist. The public’s freedom of choice in this matter should be paramount.


VI. The Talent Agencies Act Must Either be Legislatively Amended or Legally Construed to Resolve the Foregoing Absurdities and Conflicts Created by the Labor Commission’s Solis Decision, and to Protect the Public

A. Ideally, the California legislature will utilize the New York Bar Association’s approach to statutorily resolve the foregoing conflicts

The 1985 Entertainment Commission was formed specifically to survey the law of entertainment states and capitals and to aid the California legislature in the drafting of the Talent Agencies Act as a model statute, supra. However, the modern-day Talent Agencies Act lands far afield from this target, especially in light of the California Labor Commission’s decision in Solis.

In 2015, attorneys in the other great American entertainment capital took issue with California’s Solis decision. That year, the New York State Bar Association’s Entertainment, Arts and Sports Law Section (“NYBA-EASL”) drafted and proposed legislation specifically exempting attorneys from the licensing requirements of talent agencies.214 In 2017, the New York City Bar Association’s Entertainment Law Committee (“NYCBA-ELC”) drafted a memorandum in support of the NYBA-EASL’s proposed legislation.215

An important distinction between the New York law and the California law is that New York retains an “incidental procurement” provision for non-agents, whereas California has unequivocally rejected this safe-harbor.216 While the NYBA-EASL and NYCBA-ELC both support an interpretation


216. N.Y. Gen. Bus. Law § 171.8; N.Y. Arts and Cultural Affairs Law § 37.01.3.
that attorneys would be covered under this exemption, they note the risk that New York courts may be influenced by the California Labor Commission’s *Solis* decision. In proposing a statutory amendment unequivocally exempting attorneys from licensing requirements and regulation under the New York laws, both the NYBA-EASL and NYCBA-ELC note the extraordinary licensing requirements and strict disciplinary measures to which attorneys are subjected, *supra*. The NYBA-EASL also notes that attorneys are statutorily exempted from licensing requirements in many other industries, and that they play a unique role in the representation of artists:

> The role of the entertainment attorney is particularly unique in that the attorney’s primary role is to review and negotiate contracts in the best interest of the artist client. Entertainment attorneys generally understand the business and develop significant contacts in the entertainment industries that may prove beneficial for the artists they represent. Failure to exempt attorneys from the agency license requirement may prevent attorneys from fully advocating for or acting on behalf of their clients.

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Even though the current statutes pertaining to theatrical employment agencies do not specifically exclude attorneys, [the NYSB-EASL] believe[s] that the licensure obligations were meant for non-attorneys who, while not held to the same professional, regulatory, and ethical standards imposed upon attorneys, must comply with some measure of requirements designed to protect the public.*

While New York has yet to implement the NYSB-EASL and NYCBA-ESL amendments to its talent agencies laws, New York attorneys have made a highly persuasive case to the Empire State’s legislature for doing so. If California truly wants the Talent Agencies Act to become adopted as a model

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218.  NYSB-EASL, *supra* note 214, at 3 ("a representative of the New York City Department (‘DCA’) of Consumer Affairs stated in response to a query at a recent New York City Bar Association program that it is possible that an attorney negotiating an employment agreement for an Artist could be found to be an unlicensed talent agent"); NYCBA-ESL, *supra* note 215, at 3 ("As the law is currently drafted, attorneys negotiating employment agreements or otherwise procuring employment for their clients could be held to violate the New York General Business Law, which is a misdemeanor crime, in addition to suffering the damages caused by having an otherwise enforceable attorney-client agreement rendered void and unenforceable").
220.  NYSB-EASL, *supra* note 214, at 5-6.
talent representation statute across all jurisdictions, it would do well to take the critiques of New York’s attorneys to heart. The California legislature needs to take up the amendment of the statute to statutorily reject the Solis construction, and to unequivocally exempt attorneys from its licensing requirements and regulations.

B. Alternatively, or at least until the state legislature acts, California courts should construe the Talent Agencies Act as a statutory exemption from liability for the unauthorized practice of law as permitted under the State Bar Act

Until the California state legislature amends the Talent Agencies Act to exempt attorneys from the statute’s requirements, California courts have built into the California code a judicial means of resolving the conflict. Section 6126 of the Business and Professions Code (i.e., of the State Bar Act) prohibits practicing law without a license. However, that is not the sum total of its effect. Section 6126 prohibits from practicing law without an attorney’s license “[a]ny person . . . who is not an active licensee of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state.” In other words, the State Bar Act provides a statutory safe harbor in which the Talent Agencies Act already lies. The State Bar Act expressly authorizes certain individuals who are licensed as talent agents to engage in the practice of law (i.e., offering, accepting, drafting and negotiating contracts) without being licensed as attorneys in California. Until such time as the state legislature amends the Talent Agencies Act, California courts would be well advised to use this as a simple means of addressing the conflict because it prevents absurd outcomes in enforcement, better protects the intended beneficiaries of the act (i.e., the artists), and addresses a multitude of public policy concerns in which the Talent Agencies Act is deficient in the effecting of its stated purpose.

VII. Conclusion

CUT TO:
EXT. HOLLYWOOD – SUMMER 2020

Much happened in the year following termination of the AMBA and the Writers’ Guild’s installation of the CCFA as the union’s new franchise agreement. In the days immediately following AMBA’s effective termination, more lawyers got involved. On April 17, 2019, the Writers Guild and a handful of individual writers, including David Simon, filed a

222. The conclusions herein are consistent with all other research and commentary on the issue of whether the Talent Agencies Act encompasses attorneys as regulated persons. McPherson, supra note 204; O’Brien, supra note 96.
lawsuit in state court against the Big Four talent agencies WME, CAA, UTA and ICM. The complaint alleged that the agencies are liable for breaches of fiduciary duties and unfair business practices. In June 2019, the agencies punched back, filing a separate lawsuit in federal court against the Writers Guild for violation of antitrust laws, alleging the WGA engaged in “wanton abuse of union authority” by organizing and leading an “unlawful group boycott” of writers against the agencies, which included “inducing certain unlicensed . . . lawyers into joining the conspiracy by telling them that they should perform the work of boycotted talent agents even though it is illegal for them to do so,” alluding to the Solis decision. In August 2019, the Guild dropped its claims in state court and filed them as counter-claims in the federal antitrust case brought by the agencies. In February 2020, the federal district court in Los Angeles ordered the Guild and the agencies to mediation, where the case remains today.

Aside from the courtroom wrestling matches between the Guild and the agents, the rank-and-file screenwriter was forced to enter the 2019 and 2020 staffing seasons without their agency representatives. However, the standoff did not stop television and movies from getting made. It merely changed the process. Showrunners, staff writers and screenwriters found themselves soliciting pitches and meetings from writers directly, without needing to contact their agents first. Writers directly solicited employment and engagements directly through Guild-generated Internet submission boards, “self-advocacy, direct submission, and Twitter boosts” like #WGASolidarityChallenge and #WGAStaffingBoost. At bars throughout Los Angeles, producers, showrunners, and writers met in person at mixers thrown whereby writers and employers could meet each other directly. Most

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showrunners and writers found the “new normal” the same or even better than the old normal. Krista Vernoff, showrunner of Grey’s Anatomy, noted that her new writing staff was “the most diverse, inclusive group I’ve ever hired. It took extra effort for sure, but it was actually fun.”

For showrunners like David Simon, however, almost nothing changed: “after 25 years in this game, I haven’t once hired a writer who was introduced to me by an agent.”

Once offers were solicited and made directly, though, the writers relied on their professional representatives to negotiate those deals. A minority of writers used backchannels and clandestine tactics to engage their ex-agents. But many writers found help from their attorneys, who have been “forced . . . to walk a legal tightrope” thanks to Solis. In the highest-profile deals, writers and showrunners appeared to have relied on their attorneys alone in efforts to remain aboveboard. For example, Game of Thrones creators David Benioff and D. B. Weiss used the services of their attorney alone in negotiating a $200 million deal with Netflix.

On May 16, 2019, the Verve agency, unaffiliated with the ATA, became the first prominent talent agency to sign the CCFA, thus giving rise to its nickname: The Verve Agreement. Within three months, roughly 75 boutique agencies signed onto the CCFA’s terms. Starting in the summer of 2019, many mid-tier Hollywood talent agencies finally capitulated and began to accept the terms of the new CCFA. Within a year, major firms The Gersh Agency and Paradigm signed onto the new franchise agreement and code of conduct. By April 2020, the hold-outs remained the Big Four

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228. Id.
229. Id.
232. Sandberg, supra note 230.
agencies: CAA, ICM, UTA and WME.  In July 2020, UTA crossed the line and became the first of the Big Four to drop its lawsuit and sign the CCFA. However, a year later, the standoff continues with CAA, ICM and WME still locked in their lawsuit with the WGA.

But even assuming every agency in Hollywood accepts the terms of the CCFA, the issue is not moot. The agreement covers only the relationship between Guild writers and franchised agencies. It does not cover the thousands of non-union writers creating scripts for independent films and series. Nor does the agreement cover the relationship between the tens of thousands of actors, directors, musicians and other statutory “artists” and their talent agents who work on the fringes of the industry, sometimes for jobs paying less than minimum wage. It is this largest part of the industry – the up-and-comers, the rank-and-file, the non-stars – who must rely exclusively on the protections of laws like the Talent Agencies Act because no union will have them yet. If the law will not protect them, then these artists ought to be able to rely on competent and ethical legal counsel to act on their behalf.

The Association of Talent Agents is incorrect in its assertion that attorneys are prohibited from negotiating employment contracts and sales agreements on behalf of writers in the film and television industries in California. While the association relies on Solis, such reliance is flawed. No California court has ever adopted the Labor Commission’s interpretation of the Talent Agencies Act. Nor does the statute or legislative history support the Labor Commission’s interpretation of the Act. Instead, California courts are cautioned that adopting this interpretation invariably will lead to absurd results and conflicts with attorneys’ duties under the state constitution, the State Bar Act and the California Rules for Professional Responsibility.

Instead, California courts should interpret the Talent Agencies Act as a statutory exemption from liability for the unauthorized practice of law. This simple construction of the Act provides several benefits, both legal and practical. Legally, this construction is expressly permitted not only by the State Bar Act, but also as a “separate analogous licensing scheme” implied in the California courts’ prior holdings construing application of the Talent Agencies Act. Legally, this makes it internally consistent between both statutes. It also is consistent with the clear policy of the legislature as


evidenced not only by the plain language of the Talent Agencies Act today, but also through its century-long legislative history.

The practical policy reasons for this interpretation are clear, too. First, this holding gives the public a greater right of choice when it comes to artists’ representatives: writers can choose a talent agent or an attorney, which expands the labor market for artists’ representatives. But this does not prevent an artist from retaining the services of both a talent agent and an attorney. This also gives artists a greater choice in her protections. A writer may engage the services of a talent agent unlicensed as an attorney due to such agent’s reputation, even if the tradeoff is lesser protections in relation to potential conflicts-of-interest. Or a writer may engage the services of an attorney unlicensed as a talent agent to obtain greater protection through the Rules of Professional Conduct, even if the tradeoff requires more time and money on the client’s part to obtain an initial offer. Furthermore, giving this choice to writers better ensures against the harms the Talent Agencies Act was enacted to prevent in the first place which is protection of the artists in the first place. Nothing in the Talent Agencies Act has protected artists from the abuses arising from packaging deals and the attendant conflicts-of-interest. However, the Rules of Professional Conduct do exactly that.

FADE TO BLACK.
THE END.